

THE ALL INDIA REPORTER

1927

NAGPUR SECTION

CONTAINING

FULL REPORTS OF ALL REPORTABLE JUDGMENTS OF
THE NAGPUR JUDICIAL COMMISSIONER'S COURT
REPORTED IN

- (1) 23 NAGPUR LAW REPORTS (2) 10 NAGPUR LAW JOURNAL
(3) 7 ALL INDIA CRIMINAL REPORTS (4) 28 CRIMINAL LAW JOURNAL
(5) 99 to 105 INDIAN CASES

WITH

EXTRA JUDGMENTS

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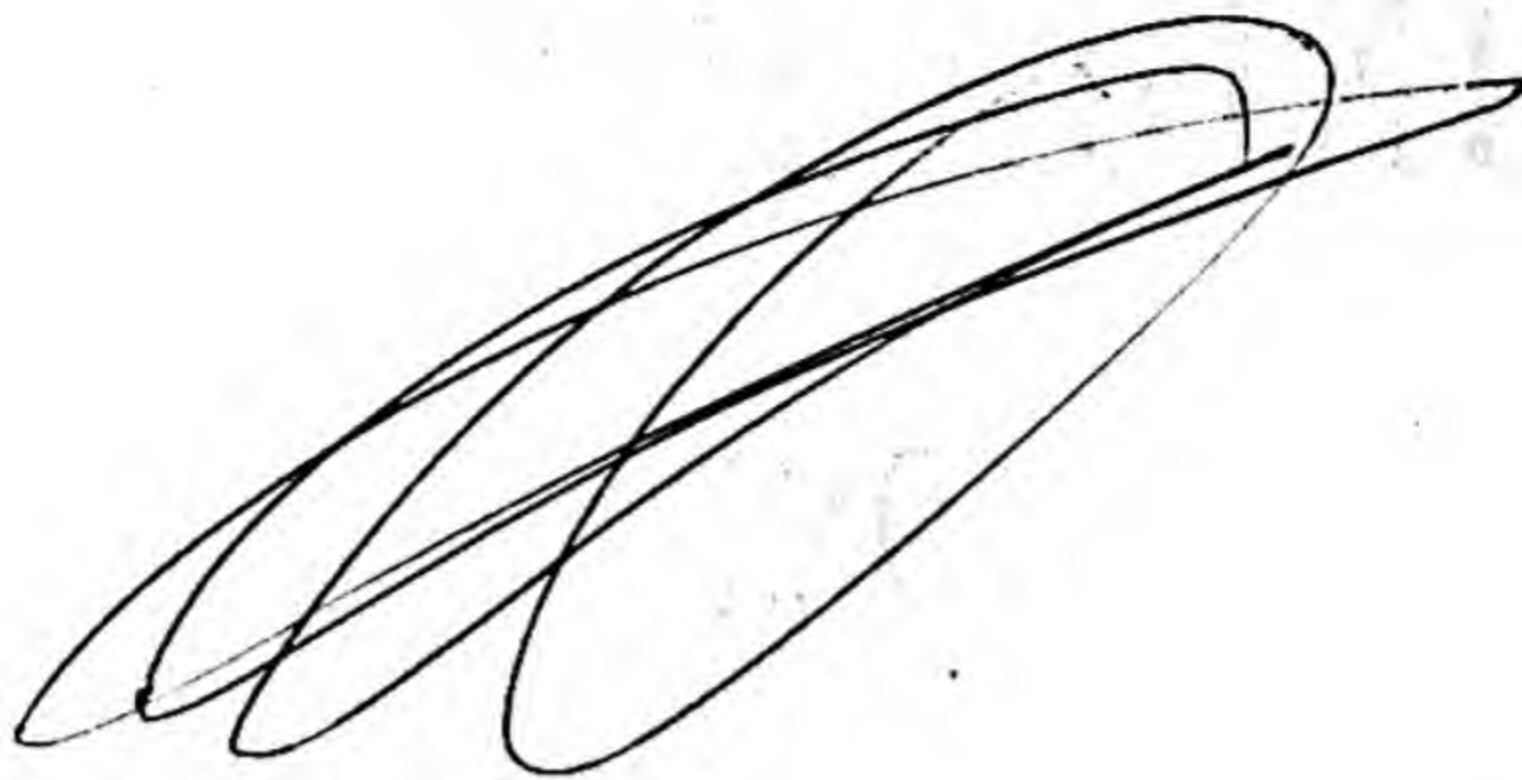
V. V. CHITALEY, B.A., LL.B.,

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NAGPUR, C. P.

1927

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TO
THE LEGAL PROFESSION
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THEIR WARM APPRECIATION AND SUPPORT



NAGPUR JUDICIAL COMMISSIONER'S COURT

1927

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7 & 8 All India Criminal Reports = All India Reporter.

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Please refer to COMPARATIVE TABLE No. II in A. I. R. 1927 Allahabad.

28 Cr. L. J. & 99 to 105 Indian Cases = All India Reporter

Cr. L. J. & I. C.	A. I. R.	Cr. L. J. & I. C.	A. I. R.	Cr. L. J. & I. C.	A. I. R.	Cr. L. J. & I. C.	A. I. R.	Cr. L. J. & I. C.	A. I. R.
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Please refer to COMPARATIVE TABLE No. II in A. I. R. 1927 Lahore.

TABLE No. III

Showing seriatim the pages of the ALL INDIA REPORTER, 1927, NAGPUR SECTION with corresponding references of other REPORTS, JOURNALS AND PERIODICALS, including the NAGPUR LAW REPORTS.

N. B.—Column No. 1 denotes pages of the ALL INDIA REPORTER, 1927 NAGPUR.

Column No. 2 denotes corresponding references of other REPORTS, JOURNALS AND PERIODICALS.

A. I. R. 1927 Nagpur = Other Journals.

A.I.R.	Other Journals	A.I.R.	Other Journals	A.I.R.	Other Journals	A.I.R.	Other Journals
1 F B	98 I C 1057	25	97 I C 983	50	98 I C 16	85	98 I C 679
2	99 I C 369	28	22 N L R 126	53	97 I C 39	86	98 I C 1062
9	97 I C 1028		97 I C 554		27 Cr L J 1063	88	98 I C 716
10	9 N L J 198	30	22 N L R 128		7 A I Cr R 138		27 Cr L J 1404
	98 I C 22		97 I C 1015	55	98 I C 37		7 A I Cr R 471
	22 N L R 147	31	97 I C 768	57	98 I C 6	89	98 I C 759
14	28 Cr L J 305	32	97 I C 1023	62	9 N L J 7	95	98 I C 658
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15	97 I C 721	37	97 I C 1006	64	9 N L J 205	100	98 I C 663
16	97 I C 980	38	97 I C 977		99 I C 659	102	22 N L R 153
17	97 I C 431	40	97 I C 664	65	9 N L J 22		99 I C 422
	27 Cr L J 1119		27 Cr L J 1144		92 I C 646	104	22 N L R 175
18	97 I C 1019	41	97 I C 988	67	22 N L R 181		10 N L J 5
	22 N L R 160	43	9 N L J 194		98 I C 540		100 I C 446
19	9 N L J 215		99 I C 858	69	23 N L R 9	107	9 N L J 163
	97 I C 694		28 Cr L J 186		9 N L J 221		97 I C 730
22	27 Cr L J 1099	44	97 I C 995		98 I C 669	110	22 N L R 19
	97 I C 363		22 N L R 169	71	91 I C 997		91 I C 290
	7 A I Cr R 162	47	9 N L J 157		27 Cr L J 181	112	23 N L R 14
23	97 I C 1001		96 I C 859	72	98 I C 631		100 I C 691
	22 N L R 173		27 Cr L J 1003	74	97 I C 916	113	99 I C 448
24	9 N L J 167	48	27 Cr L J 1062	75	94 I C 999	116	23 N L R 8
	99 I C 46		97 I C 38	76	98 I C 537		98 I C 650
	28 Cr L J 14	49	97 I C 1053	77	100 I C 406	117	28 Cr L J 177
	7 A I Cr R 170		27 Cr L J 1229	83	98 I C 695		99 I C 849

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117	7 A I Cr R 333	203	28 Cr L J 340	251	102 I C 24	336	104 I C 336
119	9 N L J 229		100 I C 820	252	102 I C 6	337	23 N L R 134
	99 I C 445		7 A I Cr R 575	253	102 I C 622		10 N L J 251
120 (1)	9 N L J 227	204	99 I C 628	255	10 N L J 135		103 I C 809
	99 I C 510	205	101 I C 227		28 Cr L J 672	338	104 I C 191
120 (2)	98 I C 1071	207	100 I C 772		103 I C 208	339	104 I C 213
121	99 I C 461	208	101 I C 693		8 A I Cr R 295	340	104 I C 198
122	100 I C 457	209	101 I C 665	256	10 N L J 106	342	104 I C 353
	23 N L R 108		28 Cr L J 489		103 I C 268	343	104 I C 398
127	10 N L J 29		3 A I Cr R 167	259	10 N L J 117	345	104 I C 358
	101 I C 284	210	101 I C 895		102 I C 588	346	104 I C 641
	23 N L R 50		28 Cr L J 511	262	102 I C 543	347	104 I C 647
129	23 N L R 1		8 A I Cr R 175	264	102 I C 635	348	104 I C 565
	99 I C 187	212	23 N L R 79	267	102 I C 612	350	104 I C 493
131	28 Cr L J 191		103 I C 220	269	10 N L J 129	351	104 I C 584
	99 I C 863	213	10 N L J 64		103 I C 186	352	New case
132	23 N L R 20		103 I C 905	272	102 I C 711	353	102 I C 305
	99 I C 635	214	101 I C 839	273	10 N L J 146	354	10 N L J 216
133	99 I C 399	216	10 N L J 87		102 I C 785		105 I C 379
134	99 I C 835		102 I C 121	276	103 I C 213	358	99 I C 626
138	99 I C 630	217	23 N L R 66	277	103 I C 71	359	101 I C 774
139	100 I C 169		103 I C 131	279	28 Cr L J 659	360	101 I C 658
145	99 I C 1050	219	10 N L J 67		103 I C 195	362	102 I C 888
147	23 N L R 16		101 I C 723	281	103 I C 158	363	100 I C 46
	100 I C 438	221	101 I C 669	283	103 I C 38	365 (1)	99 I C 518
150	100 I C 272		28 Cr L J 493	284	103 I C 148	365 (2)	99 I C 780
155	100 I C 345		3 A I Cr R 139	286	10 N L J 155	367	10 N L J 24
156	23 N L R 5	222	23 N L R 23		103 I C 12	368	100 I C 30
	10 N L J 17		101 I C 599	288	103 I C 140	369 (1)	103 I C 701
	99 I C 438		28 Cr L J 471	289	103 I C 65	369 (2)	105 I C 112
157	99 I C 774		8 A I Cr R 66	290	103 I C 209	370	99 I C 313
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161	100 I C 27		28 Cr L J 506	296	103 I C 242		102 I C 712
162	99 I C 160		8 A I Cr R 143		23 N L R 94	375	99 I C 868
163	28 Cr L J 189		23 N L R 106	299	103 I C 306	376	104 I C 558
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164	100 I C 37		101 I C 822	302	10 N L J 142	378	100 I C 21
165	99 I C 779	230	23 N L R 57		103 I C 290	379	101 I C 262
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	103 I C 486	233	101 I C 654	305	10 N L J 137	382	103 I C 166
168	10 N L J 1	234	28 Cr L J 418		103 I C 259	383	102 I C 32
	100 I C 860		101 I C 450	307	103 I C 643	384	28 Cr L J 188
170	23 N L R 40	235	10 N L J 61	308	103 I C 279		99 I C 860
	102 I C 219		101 I C 650	310	103 I C 455	385	101 I C 700
	28 Cr L J 523	236	101 I C 810		23 N L R 81	386 (1)	104 I C 503
175	100 I C 812	237	101 I C 647	312	103 I C 373	386 (2)	103 I C 143
177	100 I C 863	238	10 N L J 76	314	103 I C 361	388	28 Cr L J 183
180	100 I C 855		102 I C 228	316	103 I C 351		99 I C 855
184	28 Cr L J 388	239	102 I C 10	319	103 I C 532	389	103 I C 113
	100 I C 1044	240	28 Cr L J 425	320	103 I C 713	390	10 N L J 100
	7 A I Cr R 521		101 I C 457		23 N L R 148		102 I C 195
189	23 N L R 35		8 A I Cr R 55	321	103 I C 337	392	99 I C 1046
	28 Cr L J 645	241	10 N L J 45	322	103 I C 888	394	102 I C 30
	103 I C 101		104 I C 470	323	103 I C 710	395	102 I C 161
192	101 I C 281	242	101 I C 756	324 (1)	103 I C 884	397	28 Cr L J 180
193	10 N L J 33	244	102 I C 213	324 (2)	23 N L R 102		99 I C 852
	101 I C 275		28 Cr L J 517		103 I C 30	398 (1)	102 I C 27
195	10 N L J 43		8 A I Cr R 186	325	103 I C 818	398 (2)	99 I C 436
	100 I C 794	245	23 N L R 75	326	103 I C 883	399	105 I C 733
196	101 I C 255		103 I C 178	327	103 I C 812	400	105 I C 286
197	101 I C 320	247	102 I C 123	328	103 I C 756	401	105 I C 835
198	10 N L J 27	248	23 N L R 73	330 (1)	103 I C 697	402	10 N L J 246
	101 I C 288		101 I C 770	330 (2)	103 I C 801		105 I C 431
	23 N L R 146	249	102 I C 41	332	103 I C 690		28 Cr L J 949
199	100 I C 785		23 N L R 104	333	23 N L R 84	404	105 I C 661
200	101 I C 252	250	28 Cr L J 495		103 I C 415		105 I C 620
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	28 Cr L J 780		23 N L R 71				



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Parbat v. Bindraj, (1911) 7 N. L. R. 134=
12 I. C. 360

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Champat v. Balakdas, 20 N. L. R. 124=
A. I. R. 1925 Nag. 131=84 I. C. 202.

Overruled in A. I. R. 1927 Nag. 156

THE
ALL INDIA REPORTER
1927

NAGPUR J. C'S. COURT

*** * A. I. R. 1927 Nagpur 1**
Full Bench

KOTVAL, O. J. C., PRIDEAUX AND
MITCHELL, A. J. CS.

Umda—Defendant—Appellant.

v.

Rupchand and others — Plaintiffs —
Respondents.

Second Appeal No. 223 of 1926, De-
cided on 29th October 1926, from the
decree of the Dist. J., Nimar, D/- 19th
November 1925, in Civil Appeal No. 75
of 1925.

** * Limitation Act, S. 12—Decree later than
judgment—Application for copy filed after
signing decree—Time between judgment and
signing of decree is not to be excluded.*

An applicant cannot claim as a matter of
right a deduction of the period between judg-
ment and signing of the decree, when his appli-
cation for a copy has not been filed until after
the signing of the decree : *A. I. R. 1926 Nag. 349,*
Foll ; A. I. R. 1924 Nag. 271, Expl. [P 2 C 1]

Atmaram Bhagwant—for Appellant.

W. R. Puranik—for Respondents.

Judgment.—One of us referred this
case for hearing by a Bench. The order
of reference runs :

Counsel are now, under the authority of *Pandu
v. Rajeshwar* (1), in the habit of taking the date
of the signing of the decree as the commence-
ment of limitation for the period of appeal. It
should be from the date of the decree which is
the date of the judgment. Where injustice
owing to delay in signing a decree would occur
I am prepared to follow *Pandu v. Rajeshwar* (1),
but where appellant has had ample time after
obtaining copies to file his appeal in time cal-
culating from date of judgment I do not think
he can as a matter of right claim the period
from date of judgment on signing of decree.

(1) *A. I. R. 1924 Nag. 271=20 N. L. R. 131.*

It has been argued for the appellant
that the law contemplates that the
decree should be signed the same day as
the judgment, but from the wording of
O. 20, R. 7 and S. 33 of the Civil P. C.
it is clear that this is not the case.
Then it is said that as the amount of
costs payable is not in the judgment, a
litigant is bound to wait for the decree
being signed before applying for copies.
We are not impressed by this argument.
for the mode of calculation of costs is
given in the judgment, and the decree
itself, as regards costs, furnishes no sepa-
rate ground for an appeal. The Limita-
tion Act gives various periods within
which appeals from decrees must be filed,
and those all commence from the date
of the decree, which is the date of the
judgment ; and it must be presumed that
the Legislature was aware that some
time must frequently elapse between the
delivery of judgment and the signing of
the decree, and that it made due allow-
ance for a reasonable interval in fixing
the various periods of limitation.

Mahu v. Kishan (2), which lays down
that "no right of appeal under S. 96,
Civil P. C., arises until a decree has been
drawn up," is relied upon. That dictum
is doubtless true, but we here are con-
cerned with a different question ; that is,
whether a party can claim as a matter
of right, for purposes of limitation, the
period between the signing of the judg-
ment and the signing of the decree ; and
the fact that a memorandum of appeal
must be accompanied by a copy of a
decree is again foreign to the question
before us.

(2) [1912] 8 N. L. R. 92=15 I. C. 935.

Section 12, Cl. 2, of the Limitation Act lays down that in computing the period of limitation prescribed for an appeal, the day on which the judgment complained of was pronounced and the time required for obtaining a copy of the decree shall be excluded. But this does not prevent an application being made for a copy of the judgment and decree before the latter has been actually signed, especially in any case where there is serious delay; and these are the only cases wherein any difficulty arises. It is clear that the limitation for an appeal runs from the date of the decree, which is the date of the judgment. If delay in signing the decree actually prevents the applicant from obtaining a copy of it, he has only to apply for the copy of the decree before it is signed and an allowance will automatically be made under S. 12 of the Limitation Act for the period during which the decree remained unsigned. We think it clear that where application for a copy is made after the decree is signed no allowance whatever can be made for any part of the period during which it remained unsigned.

We think the head-note in *Pandu v. Rajeshwar* (1) states the law too widely, and we agree with the reasoning of Hallifax, A. J. C., in *Dindayal v. Anup Singh* (3). We hold that an applicant cannot claim the period between judgment and signing of the decree, when his application for a copy has not been filed until after the signing of the decree.

Let the records be returned.

Reference answered.

(3) A. I. R. 1926 Nag. 349=22 N. L. R. 60.

* * A. I. R. 1927 Nagpur 2

HALLIFAX AND MITCHELL, A. J. CS.

Baswantrao and others—Plaintiffs — Appellants.

v.

Deorao and others—Defendants — Respondents.

First Appeal No. 51-B of 1925, Decided on 22nd October 1926, from the decree of the 2nd Addl. Dist. J., Amraoti, D/- 2nd March 1926, in Transfer Civil Suit No. 2 of 1924.

* * (a) *Hindu Law—Adoption by daughter-in-law to her husband—Adopted son succeeds to the estate of his adoptive grandfather.*

When a Hindu offers the sacrificial cake or pinda, he secures the advancement of the spirit of the father, grandfather, and great-grandfather, each to an equal degree; and no offerings by any other descendant or by any collateral are of the same order of efficacy. When a son is adopted his offering of the pinda to his adoptive father, and to his adoptive grandfather and great-grandfather, are as efficacious as the offerings of a natural son; and for this reason he is entitled to succeed to share in the family property, as if he were a begotten son. Where, therefore, an adoption secures to the spirit of the last male holder of an estate, that advancement, otherwise lacking, which is given by the offering of the pinda, then the imposition of pious duties on the adopted person should carry with it the legal rights to succeed to the estate of the last male holder. But this broad principle is subject to the following equitable restrictions:

(1) That the estate is not already vested by inheritance in a person other than the adopting widow, or her co-widows.

(2) That if the estate is a share in an estate held by coparceners the consent of the coparceners is necessary. [P. 5, C. 2, P. 6, C. 1]

Where the last male holder dies in exclusive possession of his estate, and his estate vests directly in his daughter-in-law, her husband, (i. e., the son of the last holder) having predeceased the last holder, her adopting a son to her husband makes him an heir to the last holder: 14 Bom. 463; 20 Bom. 250; 21 Bom. 319; 26 Bom. 526, Ref.: A. I. R. 1922 Bom. 321; 29 Bom. 410; 31 Bom. 373 and 32 Bom. 499, Dist.

[P. 7, C. 1]

* (b) *Hindu Law—Adoption held valid is valid for spiritual as well as temporal purposes: (Hallifax, A. J. C.).*

There is no possible distinction between the validity of an adoption for spiritual purposes and its validity for temporal purposes, or between its validity for any one purpose and its validity for any other. Under the Hindu Law if an adoption is valid at all, it is valid entirely, and a person validly adopted becomes for all purposes, spiritual or temporal, the natural son of the person by or to whom he is adopted. [P. 7, C. 1]

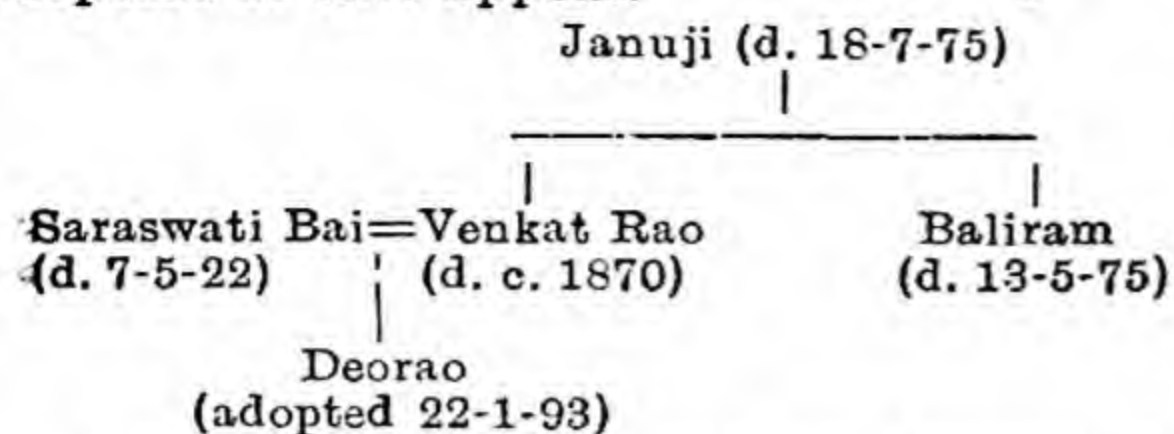
B. W. Joshi and M. B. Niyogi — for Appellants.

B. K. Bose, A. V. Khare, P. N. Rudra, B. V. Pradhan, P. C. Dutt and R. R. Jaywant—for Respondents.

Opinion.

Mitchell, A. J. C. —20th October 1926.—The only question in this appeal is the effect of a certain adoption, which is being challenged by a group of collaterals who would be reversioners but for the adoption, and is being supported by the adopted son and various persons claiming under him. The parties are Maratha Deshmukhs of the Amraoti district, governed by the Hindu Law as interpreted in Maharashtra. The following

tree shows enough of the family for the purposes of this appeal.



The adopted son Deorao is himself a collateral by birth to Januji, removed by ten degrees. The plaintiff-appellants are collaterals of still another branch and are removed from Januji by nine degrees. The property which forms the subject of the dispute was held by Januji as last male holder. He died on 18-7-75 leaving no member of his branch of the family except Saraswati Bai, the widow of one of his predeceased sons. Saraswati Bai got possession of his estate and remained in possession, latterly along with her adopted son Deorao, till her death on 7-5-22. It is not now disputed that on 22-1-93 Saraswati Bai adopted the defendant Deorao as son to her deceased husband Venkat Rao.

The question, definitely stated, is whether Deorao is entitled to succeed to the estate of Januji. The validity of his adoption by Saraswati Bai as the son of Venkat Rao cannot be disputed, in so far as the conception of adoption is confined to its religious aspect. The real point in issue is whether his assumption of spiritual duties as a son of Venkat Rao carries with it a secular right to succeed to the estate of Venkat Rao's father.

Argument in this appeal has been lengthy, and rulings have been cited which run into scores. General propositions of Hindu Law have been cited as destructive of Deorao's claim, and have been resisted as inapplicable or unsound. It will be convenient to classify these propositions into two groups: (1) those principles whose application is disputed; and (2) those propositions whose soundness is not admitted. It should be premised that the parties are Hindus of Maharashtra, where a widow who has not been expressly forbidden by her husband may adopt a son to him without having to prove his consent, provided she does so in the proper bona fide performance of a religious duty, and neither capriciously nor from a corrupt motive

nor in the ignorance of her rights: *Yadao v. Namdeo* (1). No disentitling circumstances have been pleaded against the adoption in this case, and it is not disputed that Deorao is the validly adopted son of Venkat Rao. The question is whether he is heir to the estate of Januji.

The principles of Hindu Law whose application is disputed are the following:

(1) The widow may not adopt so as to divest an estate which has already vested by inheritance in persons other than herself or her co-widows.

(2) If her husband died a member of an undivided family she may adopt only with the consent of his undivided coparceners, or with the consent of her father-in-law.

(3) She may not adopt if her husband has had a son, adopted or natural, who has discharged, before his death, all those pious duties required to secure the spiritual advancement of his father's shade.

The first principle has been established in a long series of rulings, in which *Chandra v. Gojara Bai* (2); *Gavdappa v. Girimallappa* (3); *Shri Dharnidhar v. Chinto* (4); *Ramkrishna v. Shamrao* (5); and *Lakshmibai v. Vishnu Vasudev* (6); may be cited. It has not invariably been acted upon, as may be seen from *Babu Anaji v. Ratnoji* (7) and *Bachoo v. Mankorebai* (8), but it is not necessary for the purposes of this appeal to enquire into the limitations of the rule, as a discussion of its broadest statement suffices. It has been pointed out that when Venkat Rao died he was joint with his father and his brother Baliram. His interest in the family property passed by survivorship to them. When Baliram died his interest similarly passed to his father; and when the father died Mt. Saraswati Bai inherited the estate. It is contended that this succession of vestings destroyed Saraswati's power to adopt. The argument shows confusion of thought. If the succession to Venkat Rao's estate had been in question, and if these vestings could have and had occurred, then perhaps the applicability of the principle.

(1) A. I. R. 1922 P. C. 216 = 19 Cal. 1 (P. C.).

(2) [1890] 14 Bom. 463.

(3) [1895] 19 Bom. 331.

(4) [1896] 20 Bom. 250.

(5) [1902] 26 Bom. 526 = 4 Bom. L. R. 315.

(6) [1905] 29 Bom. 410 = 7 Bom. L. R. 436.

(7) [1897] 21 Bom. 319.

(8) [1907] 31 Bom. 373 = 34 I. A. 107 = 9 Bom. L. R. 646 (P. C.).

could have been argued; but the question concerns the succession to Januji's estate, which has vested only in Saraswati Bai herself, until she adopted Deorao. This question is not complicated by any intermediate vesting contemplated in the rulings which enunciate the principle; and the principle clearly has no bearing on this appeal.

The second principle is foreshadowed in *Ranee Parvata Vardani Nachar v. Anandai* (9), and is set out clearly in *Ramji v. Ghamau* (10), which has been followed in later rulings. The argument under this head is that Venkat Rao died a member of a joint Hindu family consisting of himself, his brother Baliram and his father Januji. According to the principle stated, an adoption by Venkat Rao's widow would not be valid without the consent of Baliram and of Januji, or of Januji alone after Baliram's death; and, as they both were dead on the date of the adoption, consent thereto could not be obtained, and the adoption was therefore invalid. In connexion with this argument it is necessary to notice that the respondent Deorao did attempt to raise a plea in the lower Court that Januji had given Saraswati Bai express instructions to adopt him. He adduced evidence to prove this. The lower Court declined to entertain the plea and the point has been left undecided. In any case the evidence on this point is of a character which cannot be believed, as it is discrepant in itself, and is inconsistent with the evidence of Deorao and his first witness to the effect that Deorao was not born when Januji died. The discussion will, therefore, proceed on the assumption that Januji gave no such express instruction.

The rulings on which the principle is based relate not so much to the existence of a joint family on the death of the adoptive father, as to the existence of such a family at the time of the adoption. The reasoning is that a Hindu widow is entitled only to maintenance from the joint family and she cannot be allowed, by her own independent act, to bring into existence another coparcener. If she wishes to secure spiritual benefits for her deceased husband she may do so,

presumably, by adopting a son to him; but the adopted son will not become a coparcener unless he was adopted with the consent of the coparceners, or of the head of the family acting for them. Stated in this form the principle is a reasonable one, but when it is stated so broadly as to govern an adoption which takes place after all the coparceners have died, it loses its basis of reason. It is intended to protect the material interests of coparceners and cannot have any force when these interests are extinguished. In the present instance the last coparcener whose interest had to be protected, Januji, died in 1875, and the adoption took place in 1893, when only Saraswati Bai, who was not a coparcener, was left to represent the family. This principle also does not govern the case.

There remains the last principle, relating to the extinction of the right to adopt when all the spiritual benefits to be secured by the adoption have already been conferred on the spirit of the adoptive father. This principle emerges from *Mt. Bhoobum Moyee Debia v. Ram Kishore Acharj Chowdhry* (11) and requires no discussion in this case, beyond an indication of the fact that Venkat Rao died childless. Indeed, both Venkat Rao's and Januji's spirits still awaited the pious ministrations of a son when Deorao was adopted to Venkat Rao.

There remains now for discussion the principles whose soundness is disputed. So far, the position is that Deorao is the son of Venkat Rao and the grandson of Januji, and he is entitled to succeed to Januji's estate, notwithstanding its temporary vesting in Saraswati Bai, unless some principle of law can be established to the effect that his adoption as the son of Venkat Rao will not defeat the claim of Januji's reversioners. The appellants-reversioners claim that there is such a principle. In *Vasudeo v. Ramchandra* (12) and *Payapa v. Appanna* (13), it is stated in the form that the only widow who, on her own authority, can adopt a son so that the estate passes to him is the widow of the last male holder of that estate. In *Datto Govind v. Pandurang Vinayak* (14); *Dattatraya*

(9) [1867-69] 12 M. I. A. 397=10 W. R. 17=1 B. L. R. 1-2 Suther 135=2 Sar. 361 (P. C.).

(10) [1881] 6 Bom. 498 (F. B.).

(11) [1863-66] 10 M. I. A. 279=3 W. R. 15 (P. C.).

(12) [1899] 22 Bom. 551 (F. B.).

(13) [1900] 23 Bom. 327.

(14) [1908] 32 Bom. 499=10 Bom. L. R. 692.

Bhimrao v. Gangabai (15) and *Yeknath Narayan v. Laxmibai* (16), it is stated differently. In the words of the heading to the first cited ruling it runs :

A Hindu widow who succeeds to an estate not her husband's but as a gotraja sapinda of the last male holder...can...not make a valid adoption.

These two forms amount to the same principle, as all widows succeed to an estate as gotraja sapinda except the widow of the last male holder. In the present case *Saraswati Bai* was a gotraja sapinda to *Januji*.

The principle has been evolved by the only statutory High Court which deals with the special rules of Hindu Law applicable to women in Maharashtra, and it is entitled to the utmost respect. It has been supported before us on the following abstract grounds. The sacred texts lay down a certain order of succession, in which gotraja sapinda widows have been given a preferential position. The Courts must be careful not to exaggerate the preference and distort the line of succession by giving these widows a power further to divert the succession. The argument has some force, but it is open to the rejoinder that the sacred texts also recognize an adoption and declare an adopted son to have the same rights as a natural born son. The rule restricts the power of adoption to the widow of the last male holder, and it has still to be shown that there is a logical reason for drawing the line at this particular point.

It can be shown, to begin with, that the rule has not been invariably applied by the High Court of Bombay itself, and that widows have been allowed to make valid adoptions though they were not the widows of the last male holder of the estate. Thus, in *Babu Anaji v. Ratnoji* (7), it was held that an adoption by a widow of a son to her deceased husband made the adopted son the heir of his adoptive grandfather. The adoption in in this case was held to be valid as against a reversioner of the adoptive grandfather. In *Payapa v. Appanna* (13) a similar adoption was held to be valid, as it had been made with the consent of the widow of the last male holder, in whom the estate had vested. In this case the question of the rights of reversioners was not raised. In *Narhar*

Govind v. Balwant Lari (17), it was held that a grandmother can validly adopt when the estate had passed directly from her husband to the grandson and has come back to her directly from the grandson without the intervention of any other heir. The adoption in this case was held to be valid against the reversioners of the last male holder.

The discussions of the High Court of Bombay, therefore, do not show that it is an invariable rule in Maharashtra that only the widow of the last male holder can adopt, on her own authority, so as to vest the estate in the adopted son. The numerous rulings bearing on the point do not show any one set of principles which has been applied throughout ; each decision depends on a discussion of previous decisions and appears to have been influenced by the equities of the case. It is not easy to determine the equities in the present case, though on the whole they are probably on the side of *Deorao* who has been in possession of the estate along with *Saraswati Bai* since 1893 and has been managing it himself for at least twenty years. On the other hand, he was not adopted until about twenty-three years after the death of *Venkat Rao* and eighteen years after the death of *Januji* ; and *Januji's* reversioners are not unreasonable in claiming the estate on *Saraswati's* death. It is necessary, therefore, to find some general principle which will act as a guide in this case.

This will best be found by going back to the religious conceptions underlying the extensive practice of adoption among Hindus, which are the justification for conferring rights of inheritance on an adopted son. These conceptions are that certain ceremonies performed by a pious Hindu confer spiritual benefits on his paternal ancestors in the direct line ; in particular, when a Hindu offers the whole sacrificial cake or pinda, he secures the advancement of the spirit of the father, grandfather, and great-grandfather, each to an equal degree ; and no offerings by any other descendant or by any collateral are of the same order of efficacy. When a son is adopted his offering of the pinda to his adoptive father, and to his adoptive grandfather and great-grandfather, are as efficacious as the offerings of a natural son ; and for this reason he is entitled

(15) A. I. R. 1922 Bom. 321=46 Bom. 541.

(16) A. I. R. 1922 Bom. 347=47 Bom. 37.

(17) A. I. R. 1924 Bom. 437=48 Bom. 559.

to succeed to a share in the family property, as if he were a begotten son.

It is from these conceptions of the spiritual bond of the pinda, and developments thereof, that the whole of the Hindu law of succession is derived; and it is possible that their application to the special case of adoption by a widow in Maharashtra may afford a useful general guide. But it must be remembered that the Courts have always been careful to guard the interests of members of the family who would be unjustly prejudiced by an adoption, and any general rule based on religious considerations only must be qualified by any limiting principle which has been clearly and firmly established by judicial decisions.

On these grounds the proposition is advanced that where an adoption secures to the spirit of the last male holder of an estate that advancement, otherwise lacking, which is given by the offering of the whole pinda, then the imposition of pious duties on the adopted person should carry with it the legal right to succeed to the estate of the last male holder. This broad principle must, of course, be subject to those equitable restrictions which have already been firmly established, namely:

(1) that the estate is not already vested by inheritance in a person other than the adopting widow, or her co-widows, and

(2) that if the estate is a share in an estate held by co-parceners, the consent of the coparceners is necessary.

This proposition seems to strike a fair balance between the spiritual claims of the deceased holder and the material claims of his collaterals, as it will, on the one hand, encourage the adoption of lineal descendants with full spiritual efficacy, and will, on the other hand, avoid the arbitrary divestment of vested estates.

It may be that in the case of the adoption of a great-grandson other considerations may arise which, so far, have not come under judicial discussion, for the genealogical gap between a man and his great-grandson is wide enough to admit of many developments. But, subject to this caution the above rule appears to be sound.

Before pushing it to its logical conclusion in the present case, however, it is advisable to check it with reference to previous decisions on the subject. It will be found that it gains in strength by the process. Only the decisions of

the High Court of Bombay, and of their Lordships of the Privy Council in appeal therefrom, need be discussed, as only the special rights of widows in Maharashtra are being considered. In *Vasudeo v. Ramchandra* (12) a grandson was adopted to the last male holder, but the estate had previously vested in the daughters of the last male holder. The adoption was held to be invalid, and a similar decision would have been reached by an application of the principle as stated in the preceding paragraph of the judgment. In *Payapa v. Appanna* (13) the adopted son became grandson to the last male holder of the estate and the adoption was held to be valid. In *Datto Govind v. Pandurang Vinayak* (14) the adopted son was nephew to the last male holder, and the adoption would not have been supported by the above principle. In *Dattatraya Bhimrao v. Gangabai* (15) the adopted son became grandson to the last male holder, and his adoption was held to be invalid; it would have been held to be valid under the above principle. In *Yeknath Narayan v. Laxmibai* (16) the adopted son became grand-nephew to the last male holder, and his adoption was declared to be invalid as it would have been under the above principle. A few more instances from the Bombay Presy. in which the rule now advanced would have been applicable will be found in *Chandra v. Gojara Bai* (2), *Shri Dharnidhar v. Chinto* (4), *Babu Anaji v. Ratnoji* (7) and *Ramkrishna v. Shamrao* (5). In all of these the application of the rule would have led to the result which the learned Judges of the Bombay High Court reached by varying lines of reasoning, based on previous decisions. Indeed the only authority of that High Court cited to us which is contrary to the rule is that given in *Dattatraya Bhimrao v. Gangabai* (15), and that is an obiter dictum not governing the decision. The decision in *Lakshmibai v. Vishnu Vasudev* (6) which was affirmed by their Lordships of the Privy Council in *Bachoo v. Mankorebai* (8) is not a case in point, as the adoption there was made at the express direction of the widow's husband. The rule that is now advanced is confined to adoption by a widow without her husband's consent.

In the result, therefore, the principle is in consonance with all the rulings of

the Bombay High Court, except one namely, *Dattatraya Bhimrao v. Gangabai* (15); and it is noteworthy that though the adoption of a grandson was here held (obiter) to be invalid, a precisely similar adoption was held to be valid in *Payapa v. Appanna* (13). Similar considerations apply to other published judgments on the point, and it appears that the adoption of this principle as a general guide would leave nearly all previous decisions unaltered, and would reconcile many apparently conflicting rulings and lines of argument.

I consider it should be acted upon in the present case, and am of opinion that as Januji died in exclusive possession of his estate, and as his estate vested directly in Saraswati Bai, her adoption of Deorao as a son to her husband Venkat Rao made him as heir to Januji's estate. The appeal should be dismissed, and the appellants should pay costs of all parties.

Hallifax, A. J. C.—(21st October 1926). I have been permitted to read the draft of the judgment which my learned brother proposes to deliver in this case, and I agree in the conclusion that Deo Rao, on his adoption to Venkat Rao by his widow Saraswati Bai, became among other things the grandson of Venkat Rao's father Januji for all purposes, including the ownership of Januji's property then held by Saraswati Bai. The reasons for this conclusion however seem to me simple and capable of fairly concise statement; we can reach it by a line of reasoning from unquestionable principles of Hindu Law which leaves no room for exceptions, most of the rules described as exceptions by one side or the other in this case or so treated in the many judgments that have been cited being merely necessary consequences of those principles, and the remaining few which conflict with them being proved unsound by doing so.

There is no possible distinction between the validity of an adoption for spiritual purposes and its validity for temporal purposes, or between its validity for any one purpose and its validity for any other. Under the Hindu Law if an adoption is valid at all it is valid entirely and a person validly adopted becomes for all purposes, spiritual or temporal, the natural son of the person by or to whom he is adopted; on the day of his

adoption he ceases to exist as the son of his natural father and comes into existence as the son of his adoptive father.

In the case of *Yadao v. Namdeo* (1) their Lordships of the Privy Council said:

There does not appear to their Lordships to be any sound reason why...the Hindu Law as to the power of a Hindu widow...to adopt a son should depend on the question as to whether her husband had died as a separated Hindu or as an unseparated Hindu, or on the question as to whether the property which was not vested in her when she made the adoption was or was not vested in her as his heir. If it was her religious duty to adopt a son to her husband, that duty would be the same in either case, although possibly the right of the adopted son to the property vested in the widow might be different.

When a valid adoption has been made the only question that arises is that of the rights accruing to a son of the person by or to whom it was made who came into existence on the day it was made.

In examining the question of the effect on property of a valid adoption by a Hindu widow, some confusion of thought not seldom arises from regarding a son adopted by a widow as in exactly the same position as a posthumous son of her husband. There is a difference, but only in the point of time at which each comes into existence. A real posthumous son comes into existence at the time of his conception, that is to say, he was actually in existence in embryo before his father's death, though his sex or perhaps even his existence was then unknown. The fiction of adoption cannot possibly be strained to the extent of regarding a son adopted by a widow as in inchoate existence in her husband's mind or her own mind, as the posthumous son was in her womb, at or before the death of her husband; such a son comes into existence as a son on the day on which he is adopted and no sooner.

The only other matter to be borne in mind in this connexion is that, when a widow adopts to her husband or inherits his property or inherits property as a gotraja sapinda, she does so because she is "half the body" of her husband, not because she is related to him by marriage. Now, nobody can inherit property from his father which did not belong to his father at or after the beginning of his own existence. But the property inherited by a widow from her husband or as a gotraja sapinda is still in the possession and ownership of her husband, that

is in that of the 'half' of his body that she is. It therefore passes to her husband's son when he comes into existence by her adoption.

That fairly simple conception explains all the other rules that have been formulated on this matter. When a widow is a member of a coparcenary, she is entitled to maintenance in her own right as a widow; she is not holding her husband's share as half his body, as that has already passed to the surviving members of the family. When therefore a widow in that position makes a valid adoption there is nothing belonging to her husband which the son can take, though of course there is nothing to prevent the other members of the family from giving him the share that once belonged to his father.

That is what is meant by the statement frequently made, of which the inaccuracy is pointed out in the passage quoted above from *Yadao v. Namdeo* (1), that a widow in a joint family cannot make a valid adoption without the consent of the coparceners or of her husband's father. She requires only the consent of her husband, express or implied, and an adoption made with that consent is valid for all purposes and in all its effects; but the accrual to the person adopted of an interest in his father's share in the family property is not one of those effects, because his father no longer holds it, either in his own full person or in "half his body."

It is for the same reason that an adoption by a widow cannot divest an estate that has already vested by inheritance in another person; her husband no longer owns it, even through her, when his son comes into existence. But here again the consent of the person in whom the estate has already vested passes it back to the person adopted, who would have inherited it if he had come into existence earlier, though the absence of that consent cannot make the adoption less valid and effectual; the giving of the consent merely adds an effect which the adoption would not have without it. As for reversionary heirs, their consent is not only no more necessary for the validity of the adoption than that of any of the other persons mentioned, but also it is obviously unnecessary for the passing to the adopted son of property in

which they have no more than an expectant interest.

The rulings of the Bombay High Court on which the learned pleader for the appellant mainly relied in argument were those in *Datto Govind v. Pandurang Vinayak* (14), *Dattatraya Bhimrao v. Gangabai* (15) and *Yeknath Narayan v. Laxmibai* (16). In the first of these cases it was held that a Hindu widow who succeeds to an estate not her husband's, but as gotraja sapinda of the last male holder and in consequence of the absence of nearer heirs, cannot make a valid adoption. It has been shown in the extract already quoted from the judgment in *Yadao v. Namdeo* (1) that the adoption could not be invalid for the reason stated.

In each of the two other judgments mentioned the discussion of the question with which we are concerned was begun after it had been found and stated that it did not arise in the case at all. In *Dattatraya Bhimrao v. Gangabai* (15) Mr. Justice Shah found as a fact that the alleged adoption of the first defendant, which was the adoption in question, never took place, and then went on to say:

Strictly speaking the question of the validity of the adoption of Defendant No. 1 does not arise. But in view of the argument on the question it seems to me to be desirable to decide that question. And in any case its invalidity if established could afford an additional ground for ignoring the adoption.

The learned Judge then went on to hold that the widow who was alleged to have made the adoption, but had not made it

could not adopt to her husband so as to affect the devolution of the estate inherited by her as a gotraja sapinda.

This appears to be based solely on the authority of previous decisions of the Court, particularly that in *Datto Govind v. Pandurang Vinayak* (14), the case last mentioned.

Similarly in *Yeknath Narayan v. Laxmibai* (16) the learned Judges found that Narayan, the husband of the widow who made the adoption, survived his brother Ramchandra and was, therefore, the last male owner of the property in dispute, and then said: "Our finding that Narayan died last is sufficient to dispose of the case." The subsequent discussion of an imaginary case built on the hypothesis of Ramchandra having survived Narayan ends in the decision

that a widow who inherits property as a gotraja sapinda has no power to adopt to her own husband, and any adoption made by her is invalid and will not affect the rights of subsequent reversioners.

Taken literally, the decision in each of these cases of the question that did not arise, like that in the first of the three, where it did, could hardly be supported, even if it had not been shown to be wrong in the passage quoted above from the judgment of the Privy Council in *Yadao v. Namdeo* (1). Neither the power of a widow to adopt nor the validity of an adoption made by her could possibly be affected by her inheritance of property before or after her husband's death. If we take the decision as meaning that such an adoption, though valid, does not include among its effects any change in the devolution of the property held by the widow so as to affect the rights of the reversioners, it seems equally difficult to accept them, as the reversioners have no rights but merely a hope of acquiring rights in the future.

Judgment.—(22nd October 1926). In accordance with the separate opinions delivered, the appeal will be dismissed and the appellants will be ordered to pay all the costs.

Appeal dismissed.

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KINKHEDE, A. J. C.

Nago—Defendant—Appellant.

v.

Multanmal—Plaintiff—Respondent.

Second Appeal No. 24-B of 1924, Decided on 8th December 1926, from the decree of the Addl. Dist. J., Akola, D/17th October 1923, in Civil Appeal No. 13 of 1923.

(a) *Civil P. C., S. 2 (12)*—Person who has secured decree under *Specific Relief Act, S. 9*, can recover mesne profits—*Specific Relief Act, S. 9*.

A person who has secured a decree under S. 9 of the *Specific Relief Act* is entitled to recover mesne profits as against a person in possession other than the true owner and it is for the person in possession to prove that he has superior right to possession and to appropriate the profits: 24 *All. 501, Foll.* [P. 10, C. 1]

(b) *Damages—Tort—Trespass.*

An act of wrongful possession is an act of trespass which gives rise to a cause of action to a suit for damages in tort.

(c) *Co-sharers—Suit by.*

One co-owner can maintain a suit for mesne profits against the trespasser just as he could maintain an action in ejectment against him, without joining the other co-owner as a party to the action: 39 *Mad. 501* and 13 *C. P. L. R. 130, Foll.* [P. 10, C. 1]

M. B. Niyogi—for Appellant.

D. W. Kathalay—for Respondent.

Judgment.—The appellant was formerly the owner of the fields in suit which were put to auction and purchased by the respondent. In due course of time the plaintiff-respondent was put into possession of the property purchased by him at the auction as against the appellant. Later on the appellant dispossessed the respondent otherwise than in accordance with law. This led to the summary suit under S. 9 of the *Specific Relief Act* being instituted against him by plaintiff-respondent. The latter succeeded in obtaining a decree in that suit. The present suit is for recovery of mesne profits from the appellant in respect of the period during which he kept the plaintiff out of possession.

The defendant-appellant admitted that the fields were purchased by plaintiff, but urged that one Multanmal Chandmal was co-owner with plaintiff in equal share, that he cultivated only a half portion under a contract of batai under Multanmal Chandmal, and that plaintiff's half portion was cultivated by his lessee Narayan. The plaintiff denied that Multanmal Chandmal had any interest in the property and that the defendant's possession was only over half the fields. According to him the defendant was in wrongful possession of the entire fields in suit.

The Courts below held that the defendant failed to prove that Multanmal Chandmal had any interest as a co-owner in the fields in suit. They also held that the defendant was in wrongful possession of the entire fields. A decree for possession and for payment of mesne profits to the extent of Rs. 250 was accordingly passed against the defendant. It is against this decree that the present appeal has been preferred.

The first and foremost attack on the decree is that the lower Courts were wrong in passing a decree for mesne profits against the defendant merely on the strength of a judgment in the summary suit under S. 9 of the *Specific Relief Act*, in the absence of any

evidence to show that plaintiff was the sole owner of the property of which he claimed to recover mesne profits. To my mind there is no substance in this contention. The defendant was admittedly not the true owner of the property at the date of the trespass. He set up the right of Multanmal Chandmal to a moiety of the fields in suit. The plaintiff denied his assertion. It was, therefore, incumbent on him to prove the title of Multanmal Chandmal if he wanted to be relieved of the liability for mesne profits at least to the extent of half.

The Courts below concurrently held that he failed to prove Multanmal Chandmal's title to the half. The necessary consequence of this failure was to make his possession wrongful as against the plaintiff. In *Sheo Kumar v. Narain Das* (1) it was held that a person who has secured a decree under S. 9 of the Specific Relief Act is entitled to recover mesne profits as against a person in possession other than the true owner and it is for the person in possession to prove that he has superior right to possession and to appropriate the profits. Inasmuch as the defendant has failed to prove the right of Multanmal Chandmal he was properly held liable for mesne profits to the plaintiff.

The defence raised by the defendant was that he held possession of only half portions of the fields, but the Courts below have found that he held wrongful possession of the entire fields; thus his act of wrongful possession was an act of trespass which gave rise to a cause of action to a suit for damages in tort. Even assuming that plaintiff was only a co-owner and that Multanmal Chandmal was interested in the lands in suit to the extent of half, the plaintiff was entitled to maintain the suit for mesne profits against the trespasser just as he could maintain an action in ejectment against him without joining the other co-owner as a party to the action: *Ahmed Sahib Shutari v. Magnesite Syndicate, Limited* (2), *Shamsundar v. Kunjaban* (3).

The decree passed by the lower Courts in plaintiff's favour is, therefore, correct and must stand. The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) [1902] 24 All. 501=(1902) A. W. N. 139.

(2) [1916] 39 Mad. 501=28 M. L. J. 598=29 I. C. 60=2 L. W. 460.

(3) [1900] 13 C. P. L. R. 130.

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KINKHEDE, A. J. C.

Secretary of State—Defendant—Appellant.

v.

Bagmal Kisandayal—Plaintiff—Respondent.

Misc. Appeal No. 20-B of 1925, Decided on 26th August 1926, from the decree of the Dist. J., Akola, D/- 6th April 1925, in Civil Appeal No. 112 of 1924.

(a) *Limitation Act—Construction—Words must not be construed to restrict rights unless so expressed—Provisions cannot be extended to cases not covered by the wording—Form of suit will determine what article should be applied.*

Inasmuch as the Limitation Act is an act which takes away or restricts rights to start legal proceedings it must receive such a construction as the language in its plain meaning imports. [20 W. R. 375 (P. C.), Rel. on.] It cannot be interpreted so as to restrict rights unless it is clear that the Legislature intended that this should be done. [5 C. W. N. 355, Rel. on.] It cannot also be forgotten that the provisions of the Limitation Act must not be extended to cases which are not strictly within the enactment or do not come within the strict meaning of the words used: 15 Bom. 299, Rel. on. [P 11 C 2]

The object of the Limitation Act is not to create or define causes of action but simply to prescribe the period within which existing rights can be enforced in the Courts of law: 28 Cal. 37, Rel. on. [P 12 C 1]

It therefore follows that whether a particular suit is of the nature contemplated by a particular article must depend upon the form in which the suit is brought and the relief claimed therein; for unless it comes within the wording of the first column of that article in the schedule, the limitation specified in the third column of that article cannot be made applicable to it. [P 12 C 1]

(b) *Limitation Act—To apply a particular article the plaintiff's version of the case should be looked to.*

The question of the applicability of any particular article of the Limitation Act to a particular suit for a particular relief must be decided on the assumption that the version as given in the plaint is correct and that the relief sought in the plaint flows from such a version. [P 12 C 1]

* (c) *Limitation Act, Art. 14—Plaintiff claiming title to land—Order of ejectment by Government official upholding Government title—Suit by plaintiff for declaration of title—Art. 114 does not apply.*

Where a private owner of property claims a declaration of title to the property in his peaceful possession, alleging that it is his own property as against the Government and the Government through its officers asserts a claim to that property as the property of the Government, there is a bona fide dispute as to title to the property and the real point of controversy between the two is also one of title to the said property. The mere circumstance

that an officer of Government upheld the claim of the Government and gave an order upholding the title of the Government and directing summary ejectment of the private individual from the disputed strip of land, does not alter the nature of the claimants' cause of action nor does it necessitate the asking of any relief other than the one of declaration of title on the part of the private owner. It is sufficient if he establishes his title as against the Government in order to entitle him to hold the property as against the Government. It is wholly superfluous for him to ask the additional relief of cancellation of the order, and therefore such a case is not governed by Art. 114 : 24 Bom. 435 ; 36 Bom. 325 and 39 Bom. 494, Appr. [P 12 C 2]

(d) *Berar Land Revenue Code, S. 59 (3)—Government's ownership disputed—Revenue officer has no jurisdiction.*

Where the ownership of the Government is disputed, the Revenue officer has, or can have, no jurisdiction under S. 59 (3). [P 12 C 2]

(e) *Berar Land Revenue Code—Construction—Decision under similar provisions of Bombay Revenue Code are relevant.*

The Bombay decisions construing the provisions of the Bombay Revenue Code are relevant in construing the similar provisions of the Berar Land Revenue Code. [P 13 C 2]

G. P. Dick and Cama—for Appellant.
D. W. Kathale—for Respondent.

Judgment.—The plaintiffs-respondents in this appeal own a factory abutting the Akola-Akot Road in Berar. All public roads, like all lands, which are not the property of individuals or of aggregates of persons legally capable of holding property and, except in so far as any rights of such persons may be established in or over the same and except as may be otherwise provided in any law for the time being in force, are and are declared under S. 38 of the Berar Land Revenue Code to be the property of the Government. The plaintiffs' factory has been in existence since the year 1889 and the land on which it stands including a small strip of land which is in dispute in this suit is said to be in the peaceful possession of plaintiffs and their predecessors in title for very many years. The Sub-Divisional Officer of Akot in an order dated 1-10-1920 held that a portion of the Akola-Akot road was encroached upon by the plaintiffs and he consequently ordered demolition of such structure as stood upon the encroached strip of land. The order was appealed against to the Deputy Commissioner who dismissed the plaintiffs' appeal on 17-6-1921. The plaintiffs therefore instituted this suit against the Secretary of State for India in Council

for a declaration of their title to the site in question and for an injunction restraining the defendant and his officers from pulling down the structure and in the alternative for damages. This suit was filed on 17-7-1922 after service of a notice of suit under S. 80 of the Civil P. C.

The defendant inter alia pleaded that the suit not having been instituted within one year from 1-10-1920, or at the latest from 17-6-21, was barred by limitation under Article 14 of the Limitation Act. This defence prevailed in the first Court, but was disallowed by the lower appellate Court. This appeal challenges the correctness of the order of the lower appellate Court.

Assuming that one year's period of limitation prescribed by Article 14 is applicable to a suit of this nature and that such limitation commenced to run in this case from the date of the Deputy Commissioner's order dated 17-6-1921, the suit is within time in view of the provisions of S. 15, sub-S. (2) of the Limitation Act which entitles the intending plaintiff to exclude the period of notice i. e., two months in computing the period of limitation prescribed for the suit. The contention that the suit is barred by limitation even if it be counted from 17-6-1921 cannot therefore prevail.

It is next contended that if the starting point of limitation is the date of the order by the Sub-Divisional Officer the plaintiffs' suit is hopelessly barred under Article 14. Article 14 prescribes one year's period of limitation for a

"suit to set aside any act or order of an officer of Government in his official capacity, not herein otherwise expressly provided for."

Inasmuch as the Limitation Act is an Act which takes away or restricts rights to start legal proceedings it must receive such a construction as the language in its plain meaning imports; *Luchmee Buksh Roy v. Runjeet Ram Panday* (1); it cannot be interpreted so as to restrict rights unless it is clear that the legislature intended that this should be done: *Jogeshur Bhagat v. Ghanasham Dass* (2). It cannot also be forgotten that the provisions of the Limitation Act must not be extended to cases which are not strictly within the enactment or do not come within the strict meaning of the words used.

(1) 20 W. R. 375=13 B. L. R. 177=2 Suther. 897 (P. C.).

(2) [1900] 5 C. W. N. 355 (356).

Cf *Parashram Jethmal v. Rakhma* (3). The object of the Limitation Act is not to create or define causes of action but simply to prescribe the period within which existing rights can be enforced in the Courts of law : *Surjyamonji Dasi v. Kali Kant Das* (4) and *Jivi v. Ramji* (5).

It therefore follows that whether a particular suit is of the nature contemplated by a particular article must depend upon the form in which the suit is brought and the relief claimed therein, for unless it comes within the wording of the first column of that article in the schedule the limitation specified in the third column of that article cannot be made applicable to it. The learned Additional District Judge has clearly found on a reference to the wording of the plaint that the suit is not one to set aside any order either of the Sub-Divisional Officer or the Deputy Commissioner in his official capacity, in respect of lands which are not the property of Government. The relief claimed is a declaration of title and an injunction and not the setting aside of any orders. Going therefore by the strict letter of the law and applying it to the suit as laid I must say that the suit as framed is not a suit to set aside any act or order of the officer of the Government in his official capacity, and as such it is not governed by Article 14 of the Limitation Act.

There is yet another reason why I say Article 14 does not apply to a suit as laid like the present. The plaintiffs nowhere admit that the strip of land is Government property. On the contrary they assert that it is the property of themselves as private individuals. Just as the question whether a particular claim is within the cognizance of a particular Court or not, is determined with reference to the allegations in the plaint and not with reference to the defence urged by the defendant; similarly the question of the applicability of any particular article of the Limitation Act to a particular suit for a particular relief must be decided on the assumption that the version as given in the plaint is correct and that the relief sought in the plaint flows from such a version. It therefore follows that in the face of the plaintiffs' assertion of their own title

and denial of the ownership of the Government to the strip of land in suit, there is no scope for the officer of the Government to do any act or pass any order in his official capacity in respect to the said property as they claim it to be their own. Hence where a private owner of property claims a declaration of title to the property in his peaceful possession, alleging that it is his own property as against the Government and the Government through its officers asserts a claim to that property as the property of the Government there is a bona fide dispute as to title to the property and the real point of controversy between the two is also one of title to the said property. The mere circumstance that an officer of Government upheld the claim of the Government and gave an order upholding the title of the Government and directing summary ejectment of the private individual from the disputed strip of land, does not in my opinion alter the nature of the claimants' cause of action, nor does it necessitate the asking of any relief other than the one of declaration of title on the part of the private owner. It is sufficient if he establishes his title as against the Government in order to entitle him to hold the property as against the Government. It is wholly superfluous for him to ask the additional relief of cancellation of the order.

It must be borne in mind that the civil rights of the subjects of the Crown cannot be taken away by a summary order of a Revenue Officer. It is not therefore obligatory on him to sue the Government for setting aside the specific order. The moment the private claimant's title is declared the order vanishes and falls to the ground ipso facto. As a matter of fact S. 59, Cl. (3) of the Berar Land Revenue Code gives jurisdiction to the Revenue Officer to summarily eject encroachers on what are admittedly Government lands. It does not empower him to exercise that jurisdiction in respect of lands in or over which any rights of private individuals may be established. The summary jurisdiction is expressly limited to unalienated lands only, which expression clearly means lands which vest in the Government or are the undisputed property of the Government. Where the ownership of the Government is disputed 'the Revenue Officer has or can have no juris-

(3) [1891] 15 Bom. 299.

(4) [1900] 28 Cal. 37=5 C. W. N. 195.

(5) [1878] 3 Bom. 207.

diction, and any order by him directing summary ejectment can have no effect as soon as it is declared that the land is the property of individuals and therefore exempted from his jurisdiction. Given jurisdiction the order is intra vires and requires to be set aside. But where the jurisdiction is wanting the official capacity of the officer to act under S. 59 (3) becomes challenged and the order passed by him in that capacity would have to be treated as ultra vires and therefore void. Law does not compel a litigant to sue to set aside an order which is void or a nullity. To ask a civil Court to apply Article 14 even to a suit where the title of the Government to the property in suit is disputed and the plaintiff seeks to establish his own title in derogation of that of the Government, is virtually to ask it to assume for the purposes of limitation that the assertion of ownership by the defendant is correct and to ignore the plaintiff's assertion in the plaint that the land is his private property. I cannot therefore uphold the contention that the present suit, as framed is governed by Article 14.

As the plaintiffs were admittedly in possession of the strip of land at the date of suit the only relief they were entitled to claim was one of declaration. As the main purpose of a declaratory suit like that of a suit for ejectment is to obtain relief on the strength of title, such a suit cannot be regarded as a suit to set aside an entry or order of a Revenue Officer : Article 14 cannot therefore apply to such a case : cf. *Dhakeshwar v. Mt. Gulab Kuer* (A. I. R. 1926 P.C. 60).

The Additional District Judge in arriving at the conclusion that Article 14 does not apply but that Article 120 applies to a suit for a declaration of title, referred to the following Bombay decisions in which the Bombay High Court had occasion to deal with similar provisions of the corresponding sections of the Bombay Revenue Code :

Surannana v. Secretary of State (6) ; *Malkajeppa v. Secretary of State* (7) and *Rasulkhan Hamadkhan v. Secretary of State* (8).

I find they fully bear out his afore-said conclusion and have my entire concurrence. It is however argued on behalf of the appellant that the Bombay decisions can have no bearing on a case arising under the Berar Land Revenue Code. But it must be borne in mind that S. 38 of the Berar Code and in fact the whole of that Code was copied from the Bombay Code of 1879. S. 59 of the Berar Code is practically a reproduction of S. 61 of the Bombay Land Revenue Code. It is therefore not correct to say that a construction which was put upon similar sections of the Bombay Statute should not be taken as a guide or help to the construction of the corresponding provisions of a similar Statute in force in Berar.

The following cases also support the same view : *Patdaya v. Secretary of State* (9), *Dhanji v. The Secretary of State* (10) ; *Sir Wasif Ali Mirza v. Saradindu Narain* (11) ; *Peary v. Secretary of State* (12) ; *Mt. Munna v. Suklal* (A. I. R. 1924 Nag. 142) ; and *Haro Mandal v. Dhiranath Das* (A. I. R. 1925 Pat. 784). Throughout I have proceeded on the assumption that the plaintiffs' assertions of private ownership were true and correct.

Under these circumstances the decision of the lower appellate Court, based as it is upon the right construction of the statute in force in Berar, is correct. I am not prepared to say that it is incorrect or that the lower appellate Court has committed an error of law in holding that the present suit for a declaration of title and injunction is not a suit to set aside an order of an Officer of Government in his official capacity within the meaning of Article 14 of the Limitation Act. The case was rightly remanded for decision of the crucial question of title on which depends the validity or otherwise of the order dated 1 October 1920.

The appeal therefore fails and is dismissed with costs. Pleader's fee Rs. 100.

Appeal dismissed.

(6) [1900] 24 Bom. 435 = 2 Bom. L. R. 261.

(7) [1912] 36 Bom. 325 = 15 I. C. 517 = 14 Bom. L. R. 332.

(8) [1915] 39 Bom. 494 = 29 I. C. 490 = 17 Bom. L. R. 513.

(9) A. I. R. 1921 Bom. 273 = 48 Bom. 61.

(10) [1921] 45 Bom. 920 = 61 I. C. 347 = 23 Bom. L. R. 279.

(11) A. I. R. 1925 Cal. 953.

(12) A. I. R. 1924 Cal. 913.

A. I. R. 1927 Nagpur 14

KOTVAL, O. J. C., AND PRIDEAUX, A. J. C.

Josaballi—Applicant.

v.

Ayub Karim Kachhi—Non-Applcant.

Criminal Revision No. 162-B of 1925, Decided on 14th October 1926, from the order of the S. J., West Berar, Akola, D/- 29th August 1925, in Criminal Appeal No. 1 of 1924.

Criminal P. C., Ss. 195 and 476—Forgery in respect of proceedings in Court—Prosecution should be launched whether forger is party or not.

Prideaux, A. J. C.—A Court has power to launch the prosecution of a person for forgery committed in respect of proceedings in Court, whether that person is a party to those proceedings or not: *A. I. R. 1925 Bom. 433* and *A. I. R. 1926 All. 21, Foll.*; *A. I. R. 1925 Rang. 28, not Foll.* [P 15, C 1]

G. G. Hatwalne and *J. R. Chandurkar*—for Applicant.

S. D. Rama—for Non-Applcant.

G. P. Dick—for the Crown.

Order.

Prideaux, A. J. C.—(5th February 1926). There is a question in this case, which, it seems to me, should be decided by a Bench of this Court. It is:

Whether S. 195 (c) of the Criminal Procedure Code controls S. 476 of the same Code; or whether the two are to be read as sections independent of or merely supplementary of each other.

The question is one of great importance and often arises.

The High Courts in India hold widely divergent views on this question. Allahabad, Patna and Bombay in one case hold one view. I may mention, *Emperor v. Khushali Ram* (1); *Dwarka Prasad v. Makund Sarup*, (*A. I. R. 1926 All. 21*); *Bhau Venkatesh Chakorkar, In re* (2) and *Ashurfi Singh v. Bhisewar Pratap* (3). And in the case reported in *Narain Salig Ram v. Emperor* (4), I have followed Allahabad and Patna. On the other side I may quote *Jadunandan Singh v. Emperor* (5); *K. Ramalingam, In re* (6); *Govinda Aiyar v. Emperor* (7); *Lakshmi-*

(1) [1918] 40 All. 116=43 I. C. 436=15 A. L. J. 912.

(2) *A. I. R. 1925 Bom. 433*=49 Bom. 608.

(3) *A. I. R. 1922 Patna 362*=1 Pat. 295.

(4) [1919] 20 Cr. L. J. 426=51 I. C. 202.

(5) [1910] 37 Cal. 250=10 C. L. J. 564=4 I. C. 710=14 C. W. N. 330.

(6) [1917] 40 Mad. 100=31 I. C. 653=2 L. W. 1135.

(7) [1919] 42 Mad. 540=36 M. L. J. 448=9 L. W. 422=50 I. C. 824=(1919) M. W. N. 459 (F.B.).

das Lalji, In re (8) and *Guruswamy v. Ebrahim* (9).

There is also a question here as regards S. 193 (perjury) arising from the alleged forgery, which might well be decided by the Bench.

Forwarded to the Judicial Commissioner for favour of orders.

Opinion.

Prideaux, A. J. C.—(14th October 1926). The question which I submitted for decision by a Bench is:

Whether S. 195 (c) of the Criminal Procedure Code controls S. 476 of the same Code; or whether the two are to be read as sections independent of or merely supplementary of each other.

The learned counsel for the Crown supports the applicant in the present case, and contends that S. 476, Criminal Procedure Code, does not exclude cases in which witnesses are concerned. S. 476 of the Criminal Procedure Code was substituted by Act XVIII of 1923. Before the amendment I held in *Criminal Revision No. 133-B of 1918, decided on 16-11-18*, that in a case of forgery there was nothing to preclude a Judge from proceeding against the persons concerned with regard to forgery itself when the forgery has come to its notice in the course of a judicial proceeding. I further held that proceedings under S. 476 were not invalidated by the mere fact that the accused was neither a party nor a witness in the original suit. As far as perjury is concerned, S. 195, Criminal Procedure Code, makes it clear that when this offence is committed in, or in relation to, any proceeding in any Court, the person cannot be proceeded against except on the complaint in writing of such Court or of some other Court to which such Court is subordinate.

The difficulty is as regards cases of forgery committed by a person not a party to proceedings in the Court. In a case after the amendment of 1923, *Bhau Vyankatesh, In re* (2) it was held that:

In S. 195 (c) of the Criminal Procedure Code, the phrase 'a document produced or given in evidence', means a document produced or given in evidence either by the party who is alleged to have committed the offence or by any one else.

And it was held by the Allahabad High Court in *Dwarka Prasad v. Makund Sarup* (*A. I. R. 1926 All. 21*) that there is nothing to prevent a Court from making a complaint under the ordinary law in respect of the offence under S. 471,

(8) [1908] 32 Bom. 184.

(9) *A. I. R. 1925 Rang. 28*=2 Rang. 374.

I. P. C., which is found to be committed either by a party or a witness. This case was also decided after the amendment. The Madras High Court held different views at different times. The Rangoon High Court in *C. T. Guruswamy v. D. K. S. Ebrahim* (9) holds that it is not open to a Court to make a complaint under S. 476 of the Code of Criminal Procedure in respect of any person other than persons who are parties to the proceedings before it.

It seems to me that an offence like forgery, committed in reference and to support any party in civil or criminal proceedings, is really an offence against public justice. It is fabricating false evidence and would, in any case, be punishable under S. 193, Indian Penal Code; and the Court can proceed against the person responsible, under S. 476. But I do not think that the Legislature can have intended to prevent a Court from proceeding for an offence of forgery against the person committing it merely because he is not a party to the proceeding. It seems to me undesirable that proceedings for this class of offence should be restricted to those started by private persons. I would hold that a Court has power to sanction the prosecution of a person for forgery committed with respect to proceedings in Court, whether that person is a party to those proceedings or not. Looking to the length of time that has lapsed and to the present application being to satisfy a private grudge and not to further the ends of justice and to the improbability of establishing the case if true, I think the Sessions Judge was right in directing the withdrawal of the complaint and I would not interfere with that order.

Kotval, O. J. C.—(14th October 1926). In view of the conclusion of my learned colleague, with which I respectfully agree, that it is not desirable to make the complaint, it seems unnecessary to enter into a discussion of the question of law involved.

Withdrawal of complaint approved.

* A. I. R. 1927 Nagpur 15

KINKHEDE, A. J. C.

Thakur Raghurajsing — Judgment-debtor—Appellant.

v.

Thakur Debisingh — Decree-holder—Respondent.

First Appeal No. 56 of 1925, Decided on 16th August 1926, from the decree of the Addl. Dist. J., Damoh, D/- 1st May 1925, in Miscellaneous Judicial Case No. 45 of 1924.

* *Hindu Law—Impartible estate—Impartible estate is alienable by the holder unless there is custom to the contrary—Burden is on holder to prove the custom.*

The ordinary rule is that the holder of the impartible estate can alienate it at his pleasure; 22 *Mad.* 383 (P. C.), *Foll.* This clearly affirms the right of his creditors to proceed against the estate for the satisfaction of their claim against him. It follows, therefore that the holder of an impartible estate is not entitled, in answer to an attachment of the estate in execution of a decree against him, to raise the contention that he has no disposing power over the estate held by him unless there is a custom in the family to that effect, and the burden of proving the custom is on him.

[P 16 C 1]

P. C. Dutt—for Appellant.

Atmaram Bhagwant—for Respondent.

Judgment.—This appeal arises out of execution proceedings based on a decree obtained by the respondent Debisingh against the appellant Raghurajsingh for arrears of maintenance as also future maintenance. The judgment-debtor is the Obaridar of a number of villages which have been held in the family for generations, whereas the decree-holder is a junior member of the family entitled only to maintenance. The decree-holder attached mouza Hindoria in execution of his decree. The judgment-debtor preferred an objection on the ground that it is not liable to attachment and sale; in other words, that it is inalienable as it forms part of an impartible estate. The executing Court held an enquiry into this matter and came to the conclusion that the judgment-debtor failed to prove that the estate under attachment was not liable to attachment and sale. The judgment-debtor has therefore come up in appeal.

It is contended before me that as the estate is impartible it must necessarily follow that it is inalienable also. So far as I have been able to understand the

nature of this estate it appears to me that there is nothing which precludes the holder of the estate for the time being, the judgment-debtor in this case, from alienating the property or any portion thereof. As a matter of fact it is admitted before me that the present judgment-debtor has himself mortgaged the property very heavily. We are not here concerned with the question as to whether the junior members of the family have any such interest in the estate as would entitle them to alienate it at their pleasure. The question raised is one of the transferability of the judgment-debtor's interest therein. The matter involved in this appeal is so, far as I can judge, set at rest by the decisions of the Judicial Committee in *Sartaj Kuari v. Deoraj Kuari* (1) as also in *Venkata Surya Mahipati Rama Krishna Rao v. Court of Wards* (2), where their Lordships have subscribed to the view that the holder of the impartible estate can alienate it at his pleasure. This clearly affirms the right of his creditors to proceed against the estate for satisfaction of their claim against him. It follows that the holder of an impartible estate is not entitled in answer to such a claim to raise the contention that he has no disposing power over the estate held by him. Their Lordships of the Privy Council have also expressed a view in *Durgadut Singh v. Rameshwar Singh* (3) that property granted as babuana to a junior member of Darbhanga Raj family in lieu of money maintenance though impartible was not by reason of that fact inalienable and that it may be alienable. This shows that everything depends upon the custom obtaining in such impartible estates. In the *I. L. R. 36 Calcutta* case the family custom of the so-called inalienability was held not established. In the present case also the Additional District Judge has held that it is not established and that finding may be said to have been accepted as it is not the subject of any ground of appeal before me. The burden was, as pointed out by this Court in *Quazi Abdul Huq v. Meghraj* (4), on the appellant to prove

that his Obari village formed an exception to the ordinary rule.

The appeal therefore fails and is dismissed with costs. Pleader's fee Rs. 40.

Appeal dismissed.

* A. I. R. 1927 Nagpur 16

KOTVAL, O. J. C.

Dastru Mahar — Purchaser — Appellant.

v.

Official Receiver—Respondent.

Second Appeal No. 148 of 1925, Decided on 10th September 1926, from an order of the Dist. J., Bhandara, D/- 7th January 1925, in Miscellaneous Appeal No. 10 of 1924.

* *Provincial Insolvency Act* (1920), S. 29—*Property devolving on insolvent after adjudication can be transferred before assignee intervenes if transaction is bona fide.*

Immovable property acquired by an insolvent after the adjudication order but before his final discharge, can be transferred by him provided transaction is bona fide and for value and is completed before the intervention of the Official Assignee: 43 *Bom.* 890 and *Cohen v. Mitchell*, (63 *L. T.* 206), *Foll.*

The same rule applies whether the property is acquired by the insolvent or it has devolved upon him by succession. [P 17, C 1]

M. B. Niyogi—for Appellant.

Judgment.—One Govind Baliram was adjudged insolvent on the 14th July 1914. The appellant alleges that the immovable property in dispute devolved on the insolvent in 1916 and that the latter sold it to him on the 16th April 1919. In 1924 the property was ordered by the Insolvency Court to be sold for the benefit of the creditors. The appellant objected to the sale alleging that as he was a bona fide purchaser for value before the Receiver intervened with regard to it, the sale was good against the Receiver. The Insolvency Court disallowed the objection without any proper inquiry into the matter.

The District Judge upheld the trial Court's order on the ground that no question of good faith or valuable consideration arose in the matter as the property vested in the Receiver under S. 16 of the Insolvency Act, 1907, corresponding to S. 28 of the Act of 1920, and it was, therefore, not necessary to make any inquiry. This view does not appear to

(1) [1888] 10 All. 272=15 I. A. 51=5 Sar. 139 (P. C.).

(2) [1899] 22 Mad. 383=26 I. A. 83=7 Sar. 481 (P. C.).

(3) [1909] 36 Cal. 943=4 I. C. 2=36 I. A. 176 (P. C.).

(4) A. I. R. 1924 Nag. 133.

be correct. In *Alimahmad Abdul Hussein v. Vadilal Devchand Parekh* (1) it was held that immovable property acquired by an insolvent after the adjudication order but before his final discharge, can be transferred by him provided the transaction is bona fide and for value and is completed before the intervention of the Official Assignee. This decision refers to and adopts the rule in *Cohen v. Mitchell* (2) which was followed in India even before that case was decided.

The rule has been fully discussed in the judgment of Shah, J., and it is unnecessary to discuss it in detail here. The decision rests, as Heaton, J., observes, on how the words "do vest" are to be construed and it is the general practice not to construe them literally. That being so, the fact that the above case was not under the Provincial Insolvency Act is immaterial. Again, the case cited above was one of property acquired by the insolvent, whereas the present case is one of the property devolving upon him, but there is no reason for making any distinction on that account.

I, therefore, set aside the orders of the lower Courts and remand the case for a trial with advertence to what is stated above. I make no order as to costs in this Court. Costs in the lower Courts will abide the result.

Case remanded.

- (1) [1919] 43 Bom. 890=53 I. C. 197=21 Bom. L. R. 849.
 (2) [1890] 25 Q. B. D. 232=59 L. J. Q. B. 409=63 L. T. 206=7 Morrell 207=38 W. R. 551.

A. I. R. 1927 Nagpur 17

HALLIFAX, A. J. C.

Madhorao Gangadhar Chitnavis—
Accused—Applicant.

v.

Narayan Bhaskar Khare—Complainant—Non-Applicant.

Criminal Revision No. 228 of 1926, Decided on 3rd August 1926, from an order of the S. J., Nagpur, D/- 7th April 1926.

1927 N/3 & 4

Penal Code, S. 499—Imputation, conveyed by notice published in newspaper, of dishonesty in managing affairs of a Company is defamatory.

Where a notice published in a newspaper containing an imputation that the complainant has been dishonest in the management of the affairs of a Company and was trying to conceal that dishonesty by methods that were themselves dishonest, the imputation is defamatory.

[P. 17, C. 2]

H. S. Gour and *A. D. Mande*—for Applicant.

M. V. Abhyankar and *G. S. Brahmara-kshas*—for Non-Applicant.

Order.—The case has been argued at great length but I am still unable to see that there is anything in it that would make revision of the order for further trial even possible. The learned Sessions Judge has held that if the signature on the original of the notice published in the newspaper is that of the accused, all the ingredients of the offence of defamation are established and that, as far as the case has managed to go in two years, that signature is proved to be his. That seems to me an undoubtedly correct view of the matter, and on that view no order is possible but that further enquiry shall be made and the accused shall be asked to deny the signature appearing to be his and required to prove that it is not his if he denies it.

It is perhaps advisable to mention the three contentions raised on behalf of the accused in this Court. The first was that there was nothing defamatory in the notice. The imputation conveyed by it is that the complainant had been dishonest in the management of the affairs of the Company and was trying to conceal that dishonesty by methods that were themselves dishonest. Anything more completely falling within the definition of defamation in the Indian Penal Code would be hard to imagine.

The second argument was that the complainant has failed to prove that the signature on the original of the newspaper article is that of the accused. That is completely proved at present, and the accused has never yet denied it, either in Court or outside, though a simple denial would have saved him a great deal of trouble and expense. It is to be noted that even in this Court I heard no definite statement to the effect that that signature is not his; there was nothing but a criticism of the evidence already given to prove that it is.

The third contention was that there is no evidence of publication. As the learned Sessions Judge has pointed out, if the signature is that of the accused, publication is proved beyond the possibility of doubt by that with the other proved and admitted circumstances of the case.

The application for revision is rejected.

Application rejected.

A. I. R. 1927 Nagpur 18

HALLIFAX, A. J. C.

Seth Ajodhyaprasad and another—
Plaintiffs—Appellants.

v.

*Shivprasad and others—*Defendants—
Respondents.

First Appeal No. 138 of 1925, Decided on 16th August 1926, from the decree of the 1st Cl. Sub-J., Bilaspur, D/- 9th October 1925, in Civil Suit No. 38 of 1924.

(a) *Interest—Simple and compound—Distinction.*

The only difference between simple interest and compound interest is that the former is interest on money willingly lent and the latter on money not willingly lent. [P. 18, C. 2]

(b) *Contract Act, S. 73—Money wrongfully detained—S. 73 applies and not S. 74.*

S. 74 applies only to cases in which the creditor omits or is unable to prove that he has sustained any actual loss or damage at all. But a case of wrongful detention of money is governed by S. 73, because in the fact of the wrongful detention itself there is always clear proof, not only of the creditor having suffered actual damage, but also of the extent of that damage in terms of money. The advantage the creditor would have had if his money had not been detained of which he was deprived by its detention, stated in terms of money, is interest at the rate current in the locality on that money for the time it has been detained. [P. 18, C. 2]

*R. B. Mitra—*for Appellants.

*M. R. Bobde—*for Respondents.

Judgment.—In the mortgage bond for Rs. 1150 executed on the 11th of October 1907 the mortgagors promised to repay that sum in five years and at the end of each of those five years to pay the interest on it calculated at 12 per cent. per annum. They further promised that if they failed to pay any of those sums of interest punctually, it should be added to the principal and should carry interest at the same rate "till repayment". No payment was ever made, either of princi-

pal or interest. In the lower Court it has been held that the agreement to pay compound interest is "a provision to secure performance of the primary contract", and not a part of it. That is perhaps correct, but it really makes no difference. On that finding the learned Additional District Judge, acting apparently under S. 74 of the Contract Act, has allowed simple interest at 13½ per cent. per annum on the principal.

The decision has no basis in fact or law and is entirely arbitrary. In the first place, it has frequently been pointed out that the only difference between simple interest and compound interest is that the former is interest on money willingly lent and the latter on money not willingly lent. The mortgagees in this case lent the mortgagors Rs. 1,150. At the end of a year the latter had a further sum of Rs. 138 in their hands belonging to the former. If they chose to retain it wrongfully, or did so with the tacit or express consent of their creditors, they are surely just as much bound to pay interest on it as on the Rs. 1,150, if not more so, even if they never made any express agreement to that effect. The same considerations apply to all other amounts of interest that fell due later.

The question of whether an agreement in a contract comes under S. 74 of the Contract Act or not very seldom really arises, though it is frequently discussed at great length. That section applies only to cases in which the plaintiff omits or is unable to prove that he has sustained any actual loss or damage at all, which are certainly not common. But a case of wrongful detention of money is governed by S. 73, because in the fact of the wrongful detention itself there is always clear proof, not only of the plaintiff having suffered actual damage, but also of the extent of that damage in terms of money. The advantage the plaintiff would have had if his money had not been detained, of which he was deprived by its detention, stated in terms of money, is interest at the rate current in the locality on that money for the time it has been detained. The two last factors, the amount of money and the time it has been detained, are known, and it remains only to determine the proper rate of interest. It may be added that we arrive at exactly the same result if we apply S. 74.

In this case the proper rate of interest is undoubtedly 12 per cent. per annum. It is a matter of common knowledge that much higher rates are usual in these provinces, even on loans secured by mortgage, and that was the rate at which the parties themselves agreed interest was to run in the original contract, which was broken.

The learned Judge made the somewhat elementary mistake of ordering in a decree for foreclosure that interest should be paid after the date up to which redemption was allowed. The rate of interest after that date was fixed at 6 per cent. per annum, which has if possible less basis than the rate of 13½ ordered to be paid up to that date. Further interest was ordered to be paid on the sum due on that date for mortgage money and for costs as well. Why the plaintiffs should get only simple interest for nineteen years and a half and then be allowed to compound it, once at least, it is impossible to guess.

The decree of the lower Court will be set aside. In its place a decree will issue ordering foreclosure of the mortgaged property in default of the payment on or before the 11th of January 1927 of Rs. 10,201 and the amount of the costs incurred by the plaintiffs in both Courts. The pleader's fee in this Court will be one hundred rupees.

Decree set aside.

A. I. R. 1927 Nagpur 19

KINKHEDE, A. J. C.

Gopal Rao—Plaintiff—Appellant.

v.

Sitaram and others — Defendants—Respondents.

Second Appeal No. 394 of 1924, Decided on 2nd August 1926, from the decree of the Addl. Dist.-J., Bhandara, D/- 20th June 1924, in Civil Appeal No. 4 of 1924.

(a) *C. P. Tenancy Act (1898), S. 2—Holder of land for growing vegetables is a tenant—Mere circumstance that he holds it for a part of the year makes no difference.*

Where land is let for the purpose of growing vegetable crop, the holder of such land comes within the category of a tenant as defined in the Tenancy Act because cultivation of gardens, orchards or planting of agricultural gardens is a species of agriculture, and there is nothing inherently impossible which would prevent the

holder of such land from claiming to acquire the status of a tenant on the basis of such letting of the land to him. The mere circumstance that the period or the term for which he holds the land is only a part of the year or particular season of the year does not and ought not to make any difference in his status. [P 20 C 2]

(b) *Evidence Act, Ss. 13 and 11—Judgments inter partes are relevant as authoritative statements of facts as found by the Court.*

Judgments inter partes can be admitted in order to prove the conduct of the parties or to show particular instances of the exercise of rights, or admissions made by parties' ancestors or how the property was dealt with previously as relevant evidence under the provisions of S. 11 or S. 13. They cannot be wholly excluded from consideration because in so far as they explain the nature of possession or throw light on the motives or conduct of parties or reproduce the admissions made by the parties or their ancestors and also embody an authoritative statement of the facts which the investigation then held before the Court brought to light, such judgments have very high evidentiary value and may even shift the burden of proof: 22 W. R. 365; 24 Bom. 591 and A. I. R. 1926 Nag. 109, Ref.

[P 21 C 2]

(c) *Evidence Act, S. 35—Judgments inter partes are admissible.*

Judgments inter partes are admissible under S. 35 inasmuch as they form a record of facts in issue made by public servant in the discharge of his official duty: 18 Mad. 73 Rel. on. [P 21 C 2]

N. G. Bose, P. S. Deo and S. K. Ghosh—*for Appellant.*

M. R. Indurkar—*for Respondents.*

Judgment.—The appellant is recorded malik makbuza proprietor of 2'67 acres of land in mouza Palandur which is in dispute in this appeal. His case is that since the year 1896 his father used to let it out to the ancestors of the defendants for growing vegetables on yearly leases after he had reaped dhan crop therefrom, that this went on till 1328 Fasli when the defendants refused to vacate the land. The defendants have since been reaping both the crops. The present suit was accordingly filed on 4-1-1923 for recovery of possession of the land from the defendants. The defendants denied that they held the land in suit under any agreement or contract of lease from year to year. They maintained that they had become occupancy tenants of the land and were not liable to be ejected. They also denied that dhan crops were enjoyed by plaintiff's father as alleged by plaintiff.

The first Court came to the conclusion that the defendants' ancestors had cultivated the fields, and that the defendants continued to cultivate them but that

since the year 1892 the plaintiff's father was raising the dhan crop and the defendants the vegetable crop. It also further held that defendant's forefathers had by reason of their continuous possession of the land in suit for over 12 years (prior to 1-1-1884) acquired occupancy rights therein but that their rights were restricted to the cultivation of the vegetable crops only, and that consequently plaintiff could not eject the defendants outright but that he could eject them so far as they interfered with his right to raise the dhan crop. The annual tenancy set up by the plaintiff was held not proved and in holding as it did that the defendants' tenancy had not been determined a decree was passed in plaintiff's favour declaring the plaintiff's right to claim dhan crop only and directing the defendants to hand over possession of the land to plaintiff for that purpose on the 1st of May each year. Both parties were dissatisfied with this form of decree and plaintiff appealed to the Additional District Judge, Bhandara.

The Judge of the appellate Court confirmed the findings of the trial Court and held that the contract of yearly tenancy set up by the plaintiff was not proved; that the plaintiff's father cultivated dhan crop from 1892 to 1908-09 but not in 1909-10 and 1910-11, that in later years defendants cultivated the vegetable crops and plaintiff the dhan except in 1914-15 in which plaintiff did both crops; that the defendants' ancestors had acquired occupancy rights in respect of the land in suit. On the basis of these findings the lower appellate Court concluded that although the plaintiff's father cultivated dhan crops since 1892 it did not give the plaintiff a right to eject the defendants who were the occupancy tenants of the land, and that defendants in spite of such enjoyment of the dhan crop by the plaintiff continued to be the occupancy tenants of the lands in suit and could not be disturbed in their possession as it was not the plaintiff's case that his father's cultivation and enjoyment of the dhan crop had its origin in any special arrangement between the parties. The result was that the lower appellate Court reversed the decree of the first Court and dismissed plaintiff's suit.

Against this dismissal plaintiff comes up in second appeal and urges that the

defendants' position was not that of tenants much less of occupancy tenants but that at the most they could be only licensees liable to be turned out under S. 60 of the Easements Act; that the finding of the Courts below that the defendants and their ancestors had acquired occupancy rights is based on no evidence legally admissible and that in any case the lower appellate Court was not justified in dismissing the suit in its entirety so as to deprive the plaintiff of the right to enjoy dhan crop which was affirmed by the first Court's judgment.

The primary case as set up by the plaintiff was that the defendants were his annual sub-tenants holding under a contract of lease renewed each year, the purpose of the lease being merely to raise vegetable crop on the land. It has been argued before me that this purpose is not an agricultural purpose or at any rate was not such agricultural purpose prior to the passing of the new Tenancy Act of 1920. In support of this argument it is pointed that the phrase 'agricultural purpose' was not defined in the old Tenancy Act. Reliance is also placed on the ruling of this Court in *Battoo v. Narainprasad* (1) but I cannot attach much importance to this piece of argument in face of the later decisions of this Court in *Loola v. Pyare* (2) and *Harba v. Raghunath* (3). It, therefore, follows that where land is let for the purpose of growing vegetable crop the holder of such land comes within the category of a tenant as defined in the Tenancy Act because cultivation of gardens, orchards or planting of agricultural gardens is a species of agriculture.

There is therefore nothing inherently impossible which would prevent the holder of the land from claiming to acquire the status of a tenant on the basis of such letting of the land to him. The mere circumstance that the period or the term for which he holds the land is only a part of the year or particular season of the year, does not and ought not to make any difference in his status. I am not therefore prepared to hold that their position is that of mere licensees. The story of the annual contract of lease set up by plaintiff thus fails.

(1) [1915] 11 N. L. R. 49=28 I. C. 869.

(2) [1916] 12 N. L. R. 57=33 I. C. 497.

(3) [1919] 15 N. L. R. 60=50 I. C. 967.

The next question is whether plaintiff who is a recorded malik makbuza proprietor of the land is not entitled to eject the defendants as trespassers on the strength of his own title. I think he is *prima facie* entitled to do so unless the defendants succeed in establishing that they have acquired a right of occupancy in the land by virtue of their continuous occupation thereof for at least 12 years prior to 1884 when the old Tenancy Act of 1883 came into force. The lower Courts have found that they have acquired such occupancy rights, but the appellant challenges the correctness of this finding on the ground that there is no legal evidence to support it. It is contended that there is absolutely no evidence on record to prove the defendants' assertion that their ancestors were in possession of the land in suit between 1872 and 1884.

A reference to the judgments of the Courts below would disclose that they have been mainly influenced in coming to this conclusion by the decisions dated 31st March 1903 given in similar suits for possession filed by present plaintiff's father against the predecessors in interest of the present defendants, certified copies whereof are on record as Exs. 2 D-1 and 4 D-1. Had it not been for the fact that the suits were dismissed on the technical ground that the then plaintiff's cause of action on which they were based was not subsistent at the date of the suit by reason of his having entered into possession the decisions given in those suits on the materials then placed before the Court to the effect that the defendants in those suits had acquired the status of occupancy tenants, would have operated as *res judicata* in the present suit. The lower Courts were therefore right in not giving to those judgments the same conclusiveness which previous judgments can have on the principle of *res judicata* so as to bar the trial of the same question in subsequently instituted suit. It is contended by the appellant that if the judgments cannot operate as *res judicata*, they cannot be relied on for any other purpose also, and are in fact inadmissible as pieces of evidence. On the contrary the respondents' pleader argues that the judgments have great evidentiary value in this case and are admissible either under S. 11 or S. 13 or S. 35 of the Indian Evidence Act. Of course the conclusions

arrived at in that litigation do not bind parties in the sense that they can be precluded from establishing the contrary.

If judgments not *inter partes* can be admitted in order to prove the conduct of the parties or to show particular instances of the exercise of rights, or admissions made by ancestors, or how the property was dealt with previously as relevant evidence under the provisions of Ss. 11 or 13 of the Evidence Act, I fail to see why judgments *inter partes* should not be so admissible for those purposes. They cannot be wholly excluded from consideration because, in so far as they explain the nature of possession or throw light on the motives or conduct of parties or reproduce the admissions made by the parties or their ancestors and also embody an authoritative statement of the facts which the investigation then held before the Court brought to light, such judgments have very high evidentiary value and may even shift the burden of proof: cf. *Neamat Ali v. Gooroo Doss* (4); *Lakshman v. Amrit* (5); and *Ramdhan v. Purushottam* (6). In any case such judgments are admissible under S. 35 of the Indian Evidence Act, inasmuch as they form a record of facts in issue, made by a public servant in the discharge of his official duty: cf. *Krishnaswami v. Rajagopala* (7). Just as those judgments reproduce the then defendants' admission that the present plaintiff's father had begun raising dhan crop within ten years of those suits, and also their assertion that they and their ancestors were cultivating the land continuously from before the 30 years settlement and were enjoying both crops of the land and had thus acquired the status of occupancy tenants, similarly they reproduce the present plaintiff's father's pleas which contain no express denial of the assertion of the defendants. The aforesaid judgments were therefore held legally admissible and constituted evidence proper for consideration by the Courts below. It was open to the plaintiff to rebut the *prima facie* evidence in support of the defendants' plea of long occupation and acquisition of the occupancy rights, but he has not done so. The burden shifted to

(4) 22 W. R. 365.

(5) [1900] 21 Bom. 591=2 Bom. L. R. 386.

(6) A. I. R. 1926 Nag. 109=22 N. L. R. 49.

(7) [1895] 18 Mad. 73=4. M. L. J. 212.

the plaintiff by the production of the certified copies of the judgments remained undischarged by the plaintiff and his suit was therefore very rightly dismissed in the Court of first appeal upon the finding that the defendants have proved that they had become occupancy tenants of the land in suit.

On the findings arrived at by the Courts below to the effect that plaintiff's father reaped the dhan crop since 1892 and that the defendants' enjoyment of the land was limited only to the raising the vegetable crop every year, it is contended before me by the appellant that the lower appellate Court was not justified in dismissing the plaintiff's suit in the entirety but that it ought to have directed the defendants to put the plaintiff in possession of the land every year in order to give him every facility to enjoy the dhan crop. It will be seen that the plaintiff has merely contented himself by asserting that since 1896 his father and himself have been enjoying dhan crop of the land in suit, but he has not cared to disclose anywhere how and under what circumstances this enjoyment originated. As correctly pointed out by the lower appellate Court he does not rely upon a specific agreement or contract as giving rise to this arrangement for enjoyment of the two crops by the respective parties. In the absence of any such agreement which might account for the arrangement, I am not prepared to uphold the appellant's contention that the defendants are liable to be called upon to deliver possession every year to the plaintiff in order that the latter may reap the dhan harvest. The fact that in years gone by the defendants meekly submitted to the plaintiff's father's high-handedness in the matter of the raising and the enjoyment of dhan crop, is no ground for compelling the defendants to continue to submit to the same in the future specially when they have successfully established that they are the full occupancy tenants of the land in suit. Under these circumstances I do not see any justification for varying the decree passed by the Additional District Judge dismissing the plaintiff's suit.

The appeal therefore fails and is dismissed with costs.

Appeal dismissed.

* A. I. R. 1927 Nagpur 22

MITCHELL, O. A. J. C.

Emperor—Applicant.

v.

Dhaneshram and another—Accused—Opposite Party.

Criminal Revision No. 278 of 1926, Decided on 14th July 1926, reported by the Dist. Mag., Raipur, under S. 438, Cr. P. C.

* (a) *Criminal P. C., S. 239—Joint trial illegally held—Smashing of proceedings against one accused only will not validate the trial.*

Where in a joint trial the proceedings have been illegal from the very beginning, to quash the charges against one accused would not validate the trial. [P 23 C 1]

(b) *Criminal P. C., Ss. 234 and 235—Both sections cannot be added together so as to try an accused for more than 3 charges.*

The two Ss. 234 and 235, must be construed apart and there is nothing in the Code which would allow the two to be added together, so to speak, in order to provide for a trial of one person for more than three charges, even though some of the charges may have formed one series of acts so connected together as to form the same transaction. In other words, there is nothing in Chap. 19 which would validate the trial of an accused on six separate charges. [P 23 C 1]

Order.

(Read :—letter from the District Magistrate, Raipur, to the Registrar, Judicial Commissioner's Court, dated the 12th June 1926.)

The District Magistrate represents that in Criminal Case No. 8 of 1926, in the Court of Mr. H. G. Nargundkar, Magistrate, 1st Class, Raipur, the accused Dhaneshram has been charged with offences as follows :

(a) Offences committed between 25-12-25 and 7-1-26 under S. 409, Indian Penal Code and S. 52 of the Indian Post-Office Act, 1898 ;

(b) Offences committed on 6-12-25 under S. 408, Indian Penal Code, and S. 52, Indian Post Office Act, 1898 ; and

(c) Offences committed on 24-12-25 under S. 409, Indian Penal Code, and S. 52, Indian Post Office Act ;

and that the accused Ghanaram has been charged with two offences between 25-12-25 and 7-1-26 under S. 409 of the I. P. C. and S. 52 of the Indian Post Office Act. The learned District Magistrate points out that the joinder of these two persons in one trial is contrary to the provisions of S. 239 of the Criminal P. C. and he recommends that

the charge framed against Ghanaram may be quashed and a fresh trial ordered in respect of the offences charged against him.

From this I take it that he wishes that the present trial should stand as against the accused Dhaneshram.

The offences included in (a) with which Dhaneshram is charged relate to the same acts as the offences with which the accused Ghanaram has been charged; but the offences included in (b) and (c) above with which Dhaneshram has been charged are alleged to have been committed by him alone, without the help of Ghanaram. It is clear, therefore, that there has been a misjoinder and that the whole trial so far is void. To quash the charges against one accused would not validate the trial which has proceeded on wrong lines from the very beginning. I must therefore set aside the whole proceedings.

There is another misjoinder which the learned District Magistrate has not noticed. S. 234 of the Criminal P. C. allows for the trial of three offences of the same kind committed within the space of twelve months. S. 235 allows for the trial of one person on more offences than one which have been committed in one series of acts, so connected together as to form a connected transaction. These two sections must be construed apart, and there is nothing in the Code which would allow the two to be added together, so to speak, in order to provide for a trial of one person on more than three charges, even though some of the charges may have formed one series of acts so connected together as to form the same transaction. In other words, there is nothing in Chapter 19 of the Criminal P. C. which would validate the trial of an accused on six separate charges.

I must point out that S. 52 relates to the theft or misappropriation of postal articles and that postal articles are defined in S. 2 (i) of the Post-Office Act, 1898. It may be that the actions of the accused persons in the present case did disclose an offence under S. 52; if so, the elements of the offence have not been set out in the charges as framed by the trying Magistrate.

There has been a confusion in the prosecution of this trial and I think it will be better if the local authorities themselves put matters right. I therefore make no specific order of retrial, but leave it to the local authorities to proceed with these prosecutions on the lines which they think best.

Revision allowed.

A. I. R. 1927 Nagpur 23

KOTVAL, O. J. C.

Govindrao Subedar—Plaintiff—Applicant.

v.

Tima Lad — Defendant — Non-applicant.

Civil Revision No. 60 of 1926, Decided on 19th August 1926, from the order of the Small Cause Court J., Bhandara, D/- 7th December 1925, in Small Cause Suit No. 551 of 1925.

(a) *Wajib-ul-arz*—Construction—“*Malguzar takes without payment, in lieu of grazing, manure of thalwa's cattle*” implies that *Malguzar is entitled to manure without thalwa actually grazing cattle*.

Where the *wajib-ul-arz* provided that “the *malguzar* takes without payment, in lieu of grazing, the manure of the *thalwas'* cattle,

Held: that that clause cannot be interpreted to mean that the *malguzar* is entitled to the manure only if and when the *thalwa* actually grazes his cattle on the banjar. The fact that the *thalwa* has the right to graze his cattle is consideration for the *malguzar's* right to the manure. [P 24 C 1]

(b) *Wajib-ul-arz*—*Thalwa*—Meaning—Words—*Thalwa* means a person residing in a village, but not a tenant of that village.

The words “*Kashtkar*” and “*Thalwa*” in the *wajib-ul-arz* must be taken to mean respectively a tenant of the village and a person who is not such a tenant. [P 24 C 1]

A. V. Wazalwar—for Applicant.

M. N. Jog—for Non-applicant.

Order.—The plaintiff is the *malguzar* and the defendant a resident of mouza Pahuni. The defendant is a tenant of Takri, an adjoining village. He holds no land in Pahuni, but keeps in that village the cattle which he uses for his cultivation in Takri. The plaintiff claims the value of the droppings of the cattle. He states that the defendant is a *thalwa* of Pahuni and bases his claim on Cl. 9 of the village *wajib-ul-arz* which is as follows:

The *malguzar* takes the *khat* (manure) lying on the *akhar* (cattle stand) and the *khat* of the cattle belonging to *thalwas*. *Kashtkars* collect the *khat* of their cattle on the *padit* land No. 219 outside the *basti* and take it to their fields.

The substance of the defendant's plea was that the plaintiff was not entitled to the *khat* as none of his cattle grazed on the village lands. This plea appears to have been made with advertence to Cl. 6 of the *wajib-ul-arz*, of which the relevant part is as follows:

Grazing : cattle graze without payment of any dues in the little banjar land that exists as grazing banjar. The malguzar takes without payment, in lieu of grazing, the manure of the thalwa, cattle.

In reply the plaintiff stated that the defendant did graze his cattle on the village lands and relied expressly on Cls. 6 and 9 in support of his claim. The lower Court has found that the defendant did not graze his cattle on the village lands and that he is not a thalwa as he holds and cultivates lands in mouza Takri. It has dismissed the plaintiff's suit.

The question whether a thalwa as a matter of fact grazes his cattle on the banjar land or does not do so seems to be immaterial in deciding the question whether the malguzar is entitled to take the manure of the thalwa's cattle under Cl. 6. That clause cannot be interpreted to mean that the malguzar is entitled to the manure only if and when the thalwa actually grazes his cattle on the banjar. Such an interpretation would be hard on the malguzar and unnatural. The fact that the thalwa has the right to graze his cattle is consideration for the malguzar's right to the manure.

The question therefore is whether the defendant is a kashtkar or a thalwa. The lower Court's interpretation of the word "thalwa" appears to be strained and is not correct. If it is accepted as correct, the result would be that a person allowed to reside in the village as a labourer or artizan provided he has some cultivation elsewhere would be able to keep any number of cattle for purposes unconnected with the cultivation of the village lands and have the right of free grazing on the village grazing ground. There is no reason why a resident of the village who has cultivation elsewhere should as regards the malguzar stand in a better position than the one who has no cultivation at all. The words "kashtkar" and "thalwa" in the wajib-ul-arz must be taken to mean a tenant of the village and a person who is not such a tenant. The defendant not being a tenant of the village must be deemed to be a thalwa and must be governed by the custom governing the landlord's rights against thalwas. He has therefore no right to collect and carry away the manure of his cattle.

The learned counsel for the defendant now admits that the defendant must be

held to be a thalwa so far as mouza Pahuni is concerned. He, however, urges that the defendant has always been treated as a kashtkar by the malguzars, the custom having been waived in his favour. Such a plea should have been made at the trial and cannot be entertained at this stage.

I hold that the defendant is a thalwa of Pahuni and the plaintiff is entitled to the value of the khat that is proved to have been removed by the defendant. The lower Court has given no definite finding on the point. I therefore remand the case to the lower Court for a finding on point 4 stated by it in its judgment. A decree will be passed in accordance with the finding. The non-applicant will pay the costs of this application. Pleader's fee Rs. 10.

Case remanded.

A. I. R. 1927 Nagpur 24

KOTVAL, O. J. C.

Hari Mahadeo Gore—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revision No. 335 of 1926, Decided on 10th September 1926, from the order of the City Mag., Nagpur, D/- 24th June 1926.

(a) *Criminal P. C., S. 162—S. 162 applies to cases started on complaint.*

The view that the provisions of S. 162 do not apply to a case of complaint is not justified by anything in that section. [P 25 C 1]

(b) *Criminal P. C., S. 162—Copies can be demanded before cross-examination of the witness.*

To interpret the section to mean that the copies can be demanded only after cross-examination of a witness is begun, would lead to inconvenience and delay in the trial. [P 25 C 1]

V. N. Herlekar—for applicant.

A. V. Wazalwar—for Non-Applicant.

G. P. Dick—for the Crown.

Order.—On the 20th July 1925 three witnesses were examined: the Sub-Inspector as Court Witness No. 1, Mangesh, the complainant, as P. W. 1. and Sheo Narain Rathi as P. W. 2. The witness last mentioned was only partly examined in-chief. The rest of his examination-in-chief and his cross-examination were taken on the 23rd July 1925. On that

day the accused put in a written application praying that the police diary be sent for and that he be supplied with copies of the statements made before the investigating officer by the witnesses to be called for the prosecution. The Magistrate rejected the application stating that "they were of no real value as evidence." It is clear from the record that the diary was at this time not produced in Court and that the Magistrate had not read its contents. This order clearly ignored the provisions of S. 162, Criminal P. C. The offence with which the accused is charged, was reported to the police, and the police, after investigation had refused to challan it, it being of opinion that the case was the outcome of a love intrigue and was one of a civil nature. In view of this fact the furnishing of the copies was a matter which might be of considerable importance to the accused. It is not possible to say that the Magistrate's rejection of the accused's application has not prejudiced the accused.

The appellate Magistrate's view that the provisions of S. 162, Criminal P. C. do not apply to a case of complaint, is not justified by anything in that section, and neither the counsel for the Crown nor the complainant's pleader has attempted to support it. I am unable to see how the application can be said not to have been made at the right time. To interpret the section to mean that the copies can be demanded only after a witness' cross-examination is begun, which is what I understand the appellate Magistrate to hold, would lead to inconvenience and delay in the trial. The application does not ask that the copies be furnished then and there or before the witnesses' examination is begun. It asks for no more than what S. 162 allows and that in the very words of the section.

I cannot speculate as to how far the accused would have been benefited if the provisions of S. 162 had been complied with. I hold that the trial is vitiated by the Magistrate's omission to comply with them.

It might be sufficient to order a further enquiry for the purpose of supplying the omission, but, on the whole, I think the interests of justice will be better served by ordering a new trial before a competent stipendiary Magistrate. The

evidence has been recorded in a haphazard fashion without any advertence to the essentialities of the case. Neither the counsel for the Crown, nor the pleader for the complainant is able to point to anything on the record which shows that any ornaments were before the witnesses and were shown to them when they professed to identify them. Shantabai only speaks of owning "all the ornaments mentioned in the list"; which list it is not clear, there being several on the record.

The charge might have been more explicit as to the property which formed the subject of it. The record of the evidence of the Sub-Inspector (D. W. 1) is full of inadmissible matter. I therefore set aside the conviction of the accused and direct that he be re-tried by such competent stipendiary Magistrate as the District Magistrate appoints.

Re-trial ordered.

* A. I. R. 1927 Nagpur 25

KINKHEDE, A. J. C.

Sumitrabai—Defendant—Appellant.

v.

Hirbaji and others—Plaintiffs—Respondents.

Second Appeals Nos. 552 of 1923, and 8 of 1924, Decided on 7th August 1926, from the decree of the Dist. J., Bhandara, D/- 5th September 1923, in Civil Appeal No. 21 of 1922.

(a) *Hindu Law—Widow—Arrangement between widow and reversioners—Widow allowed to remain in separate enjoyment of husband's share—Arrangement is valid—Mutation in widow's name does not change devolution.*

An arrangement between the widow and the reversioners by which the widow was to remain in separate enjoyment of her husband's share in the joint family property is valid, and the mutation of the property in pursuance of the arrangement in the widow's name cannot change the devolution on her death: *A. I. R. 1926 P. C. 54, Rel on.* [P 27, C 1]

(b) *Hindu Law—Alienation by widow—Same latitude as possessed by manager should be allowed—Sale can be upheld on the ground of its being a prudent act of management even in absence of legal necessity.*

A Hindu widow enjoys the same latitude in the exercise of her powers as the manager of a joint family, or of an infant's estate, possesses provided she acts fairly to her expectant heirs. In such a case all that one has therefore to see is whether the widow acted fairly towards her

expectant heirs or prejudicially to their interest : 11 Bom. 320 and 18 Bom. 534, Appl.

Even though there is no absolute legal necessity, a sale by widow can be upheld, on the ground of its being a prudent and beneficial act of management : A. I. R. 1925 Nag. 302, Foll.

[P. 27, C. 2, P. 28, C. 1]

(i) *Hindu Law—Alienation by widow—Legal necessity—Consent of the body of the next reversioners is best evidence of the bona fide nature of the transaction.*

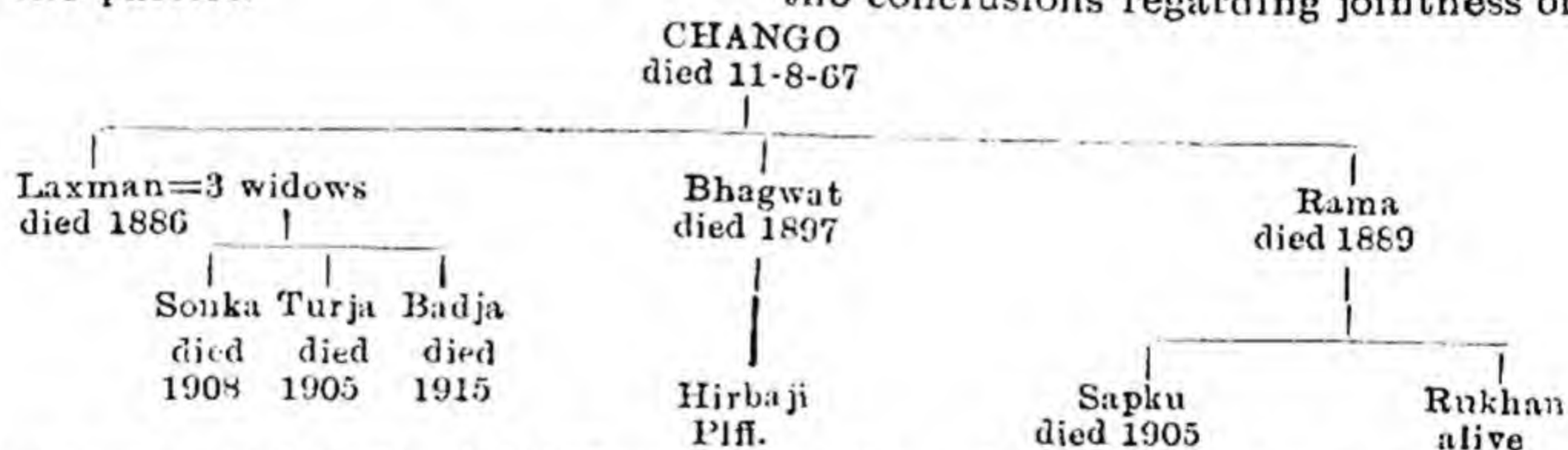
Consent by the whole, or, by the adult representatives of the body constituting the next reversion, is prima facie the best evidence of the existence of legal necessity, as also of the propriety and bona fide nature of the transaction.

[P. 28, C. 1.]

P. C. Dutt, N. G. Bose and L. G. Pandhripande—for Appellant.

Fida Husain and Abdur Raheman—for Respondents.

Judgment.—These two sister appeals arose out of a suit filed on 10th February 1920, by one Hirbaji and his assignee Muhammad Jafarkhan against Mt. Kausal widow of Hiralalsao for recovery of 14 annas 10 pies share of Mouza Kaweli. The following genealogical tree will facilitate the understanding of the contentions of the parties.



Laxman was according to plaintiff sole owner of 14 annas 10 pies share of the Kaweli. His widows sold it by Ex. D-14 dated 11th May 1901 to Hiralalsao the husband of Mt. Kausal and father of Mt. Sumitra without legal necessity. It was further alleged that Hirbaji and Rukhan inherited the property as reversioners in 1915 on the death of the last surviving widow of Laxman and that as Hirbaji sold the 14 annas 10 pies interest and Rukhan relinquished his share therein in favour of Plaintiff No. 2 the latter had a right to sue.

The defence which is material to these second appeals was that the three sons owned the said village share amongst other property as their joint family property and treated it as such and that consequent on Laxman's death it vested in his other brothers and nephews by survivorship to the exclusion of the widows of

Laxman and that the sale was justified by legal necessity and was a prudent transaction and further that the plaintiff's claim was barred by limitation.

The first Court had held before remand that mouza Kaweli was inherited by the three brothers from their father and was held by them as joint owners ; but after remand, it gave contrary finding. The lower appellate Court after considering the whole of the oral and documentary evidence came to the conclusion that the finding given before remand was correct. It accordingly held that the plaintiffs' claim based on inheritance as reversioners was untrue and dismissed it as to $\frac{3}{4}$ th share as barred by limitation and decreed it as to $\frac{1}{4}$ th on the ground that the sale though justifiable as a prudent transaction could not be upheld for want of legal necessity. Both parties have therefore appealed against the decision. I will deal with both these appeals in one judgment.

I will first deal with the plaintiffs' appeal which challenges the correctness of the conclusions regarding jointness of the

family and estate in suit. I have considered their case in the light of the arguments advanced and I am convinced that the conclusion of jointness is correct. I find that the following circumstances are clearly inconsistent with the plaintiffs' version of the devolution of estate by inheritance. It is clear that in the mutation enquiry held after Laxman's death, the village was recorded in his widow's names not because it was Laxman's exclusive property and as a matter of right, but as a matter of family convenience with the consent of all the adult surviving coparceners. It is also clear that there is absence of evidence to show when the brothers separated from each other and what property was taken by each out of the property which on the death of their father Chango was inherited by them. This shows that the property was ancestral joint family property

in their hands. The fact that Laxman had no separate property of his own, clearly supports the conclusion that mouza Kaweli was acquired by Laxman not for himself out of his separate property, but as the representative and manager of the coparcenery and with the help of joint family funds in his hands. Consequently on Laxman's death the village rightly passed by survivorship to Rama and Bhagwat. The devolution could not therefore be altered merely because the mutation showed the widows' names as proprietors against the village as the result of the arrangement consented to by all concerned.

At the date of the Mahadlapatra of 1900 the parties, however, thought fit to allot to the widows of Laxman an equal share with the sons of Rama and Bhagwat's son took a third share in the entire estate, and an arrangement for separate enjoyment was arrived at whereunder in lieu of the two shares taken by the widows and Bhagwat's son Hirbaji they were allowed to hold as owners for their exclusive benefit mouzas Gaikhuri and Kaweli and the sons of Rama held in lieu of their $\frac{1}{3}$ rd share, the lands at mouza Gangalai and Bhamodi. This had the effect of giving to the three widows a widow's estate in the $\frac{1}{3}$ rd share which included the 7 annas 5 pies share of mouza Kaweli, as the equivalent of the interest which they as the widows of a sonless and separated Hindu would have had in their deceased husband's estate. That such an arrangement is valid is clear from the decision of the Privy Council in *Seth Lakmi Chand v. Mt. Anandi* (1). Thus Laxman's three widows got a widow's estate in the said $\frac{1}{2}$ share of mouza Kaweli and the other half belonged to Bhagwat's son Hirbaji Plaintiff No. 1. It will thus be seen that there is absolutely no misconception of facts or of law applicable to them, on the part of the District Judge, in arriving at the above conclusions, as urged by the plaintiffs-appellants in their memorandum of appeal.

As Bhagwat's son lived with the widows, they purported to deal also with his $\frac{1}{2}$ interest in the village under their management as his guardian de facto and actually sold it in 1901. Since then Plaintiff No. 1's title was adversely or injuriously affected by the sale: the

purchaser's possession was adverse to Plaintiff No. 1 in respect of his aforesaid 0-7-5 share, and as such Plaintiff No. 1's suit filed more than 12 years after that date was rightly held barred by time so far as his own half interest was concerned.

Now as regards the remaining half share represented by 0-7-5 share of the mouza Kaweli owned by the widows, they, having got it under the arrangement as pointed out above, had only a widow's estate in it. They could alienate it only under compelling necessity if the affairs of the estate were such as justified a sale thereof. The question of legal necessity to support the transfer by the widows and of its ratification by Plaintiff No. 1 and the sons of Rama was therefore, material for the proper decision of this case. The lower appellate Court has held that the sale was not made for satisfaction of any legal debts incurred by the widows nor was there any necessity for the sale. But the learned District Judge has found as a fact that the village Kaweli was deserted by tenants owing to two famines preceding the sale; that there was loss in the village; that the management of the village was never a profitable concern; it is also found that the financial condition of the widows had become bad and critical and that in those days they had neither sufficient cattle nor sufficient grain to carry on the cultivation of the entire home farm lands of mouza Kaweli. Although the learned District Judge was in view of these circumstances prepared to uphold the sale as an act of prudence and as done in the course of proper management of the estate, he went off the rail when he assumed that the principles on which alienations by a Hindu widow are tested do not include either an act of prudence on her part, or even a transfer made by her in the course of proper management of the estate. Under the impression that there was no authority on the point he came to the conclusion much against his personal inclinations that the transfer by the widows did not bind the reversioners of their husband.

I must say this view is opposed to the basic principle which is common to, and underlies, cases of alienations whether they be by managers of a joint family, or by minor's guardian, or by a Hindu widow. The Hindu widow enjoys the same lati-

(1) A. I. R. 1926 P. C. 54=48 All. 313.

tude in the exercise of her powers as the manager, of a joint family, or of an infant's estate, possesses, provided "she acts fairly to her expectant heirs," as observed in *Venkaji Shridhar v. Vishnu Babaji Beri* (2) which was followed by me in *Punjabrao v. Ramkrishna* (3). All that one has therefore to see is whether the widows in this case had acted "fairly towards their expectant heirs" or prejudicially to their interest. We have the authority of the eminent Judge Mr. Justice West in *Chimnaji Govind v. Dinkar Dhonde Godbole* (4) to support this view. Even though there was no absolute legal necessity the sale was upheld in this view of the case in the case of *Venkaji v. Vishnu* (2). This Court in a Bench case *Bhagwant v. Anandrao* (A. I. R. 1925 Nag. 302) decided by Baker, J. C. and Prideaux, A. J. C. upheld a sale by father and manager on the ground of its being a prudent and beneficial act of management, even though it was found that there was no legal necessity for the sale so far as his minor son was concerned.

There is still another circumstance why the sale in question should be upheld. The transaction of sale has been ratified by Rukhan and Sapku as found by the lower appellate Court by attesting the deed under circumstances which clearly showed their intelligent concurrence in the same. The finding is not now open to challenge in second appeal. As consent by the whole, or by the adult representatives of the body constituting the next reversion, is *prima facie* the best evidence of the existence of legal necessity, as also of the propriety and bona fide nature of the transaction, it follows that the defendant who is so to say a transferee for value, to whom the widows of Laxman alienated the property with express consent of the only expectant heirs Rukhan and Sapku who were capable of acting and judging of the propriety in view of circumstances then existing, cannot be disturbed in her possession over the other 0-7-5 share also, at the instance of Hiralaji, Plaintiff No. 1, or his transferee Plaintiff No. 2 as he also must be deemed to have been duly represented in the transaction, and, in view of the long de-

lay in filing the suit, to have acquiesced in it. I therefore, uphold the sale of the entire 0-7-5 share of Kaweli effected by the widows, as binding on the present plaintiffs.

The result is (1) that the dismissal of the Plaintiffs Nos. 1 and 2's claim in respect of Plaintiff No. 1's own share viz., 0-7-5 share as barred by limitation, is maintained; (ii) that the sale of the remaining $\frac{1}{2}$ share viz., 0-7-5 made by the widows being upheld as a prudent transaction actually ratified and accepted as binding by the reversioners representing themselves and the present plaintiffs also, the present plaintiff's claim in respect thereof is dismissed; (iii) that a decree dismissing the appeal of the plaintiffs with costs will be passed in Second Appeal No. 8 of 1924; and (iv) that a decree allowing the defendant's appeal with costs and dismissing the plaintiff's suit will be passed in defendant's appeal No. 552 of 1923.

Appeal No. 8 of 1924 dismissed.

Appeal No. 552 of 1923 allowed.

A. I. R. 1927 Nagpur 28

HALLIFAX, A. J. C.

Rajaram and another — Plaintiffs — Appellants.

v.

Narain and others — Defendants — Respondents.

Second Appeal No. 375 of 1925, Decided on 17th June 1926, from the decree of the Dist. J., Wardha, D/- 21st April 1925, in Civil Appeal No. 12 of 1925.

Limitation Act, Art. 75—Instalment bond—Whole sum becoming payable in default of three instalments—No instalments paid—No suit brought to recover the whole amount in default of first three instalments—Suit to recover subsequent instalments is not barred.

An instalment bond provided that the defendant would pay to the plaintiff a certain amount every year and on default being made in the payment of any three instalments the whole amount would be recoverable at once. No payment was made at all under the bond. Plaintiff brought a suit to recover the amounts of the 7th, 8th and 9th instalments.

Held: that the plaintiff had waived his right to recover the whole amount at once which first accrued to him in default of the first three instalments, and therefore the suit to recover the 7th, 8th and 9th instalments was in time: *Case law referred.* [P. 29, C. 1]

Atmaram Bhagwant—for Appellants.

D. M. Bakre—for Respondents.

(2) [1894] 18 Bom. 534.

(3) A. I. R. 1926 Nag. 332.

(4) [1887] 11 Bom. 320.

Judgment. — In consideration of a loan of Rs. 1,840-12-0 the defendants executed an unregistered bond on the 28th of February 1915 in favour of the plaintiffs, promising to pay them Rs. 150 annually for fourteen years and Rupees 200-15-0 in the fifteenth year. A remarkable though apparently irrelevant circumstance in the case is that if the payments had been made regularly the plaintiffs would have got their money back with compound interest at something less than one per cent per annum. It was agreed that the whole amount of Rs. 2,300-15-0 should be payable at once on default being made in the payment of any three instalments. No payment at all was ever made, and the third instalment fell due on the 7th of March 1917, so that on that date the plaintiffs became entitled to sue for the whole Rs. 2,300-15-0. In the present suit they claimed to recover the amounts of the seventh, eight and ninth instalments, of which the earliest fell due on the 21st of May 1921. The suit was filed on the 16th of June 1924, but by reason of the Courts re-opening on that day after the summer vacation it has to be regarded as filed on the 6th of May of that year.

In the first Court it was held that the plaintiffs had waived their right to recover the whole amount at once which first accrued to them in March 1917, and therefore the suit to recover the instalments was in time. In appeal the learned District Judge held that there was no waiver and the suit was barred by time. Against this decision the plaintiffs have appealed. It seems fairly obvious, though it was not seen in either of the two lower Courts, that in a suit to recover instalments, that is a suit to enforce the primary contract, there could be no question of the waiver of the right to recover the whole sum at once, which is a penalty for the breach of that primary contract of the kind mentioned in S. 74 of the Contract Act.

The law in this matter is not difficult. It has been expounded in a number of published rulings, some of which purport to differ from others. They are in fact all the same, and lay down no more than is to be found in Articles 74 and 75 of the First Schedule of the Limitation Act, which is that the limitation for a suit to recover an instalment due on such a bond as we have here is

governed by Art. 74 and that for a suit to recover the whole amount still unpaid irrespective of the agreement to pay by instalments is governed by Art. 75 of the same Schedule. In addition to the cases mentioned in the judgments of this Court in *Gopal v. Dhondya* (1) and *Kesheorao v. Suklia* (2) there are the Allahabad cases of *Ajudhia v. Kunjal* (3); *Amolak Chand v. Baijnath* (4) and *Mohan Lal v. Tika Ram* (5) and the Calcutta case of *Basanta Kumar Singha v. Nabin Chandra Shaha* (6).

The plaintiffs sue to enforce a contract, —or rather three separate contracts,—to pay them Rs. 150 in each of the years 1921, 1922 and 1923. The defendants had made a promise such as is mentioned in S. 74 of the Contract Act in respect of those three contracts, and also in respect of their other contracts to pay the same sum in each of certain previous years, but that cannot possibly have an effect on their liability to carry out those three contracts provided the claim in respect of them is made in time. "It is conceivable," as was said in *Ajudhia v. Kunjal* (3) "that a bond might be so worded as to compel a creditor to sue for the whole amount immediately if any default occurred." In such a case the original agreement to pay by instalments would cease to exist when the default occurred and the agreement to pay the whole sum would be substituted for it. Here, however, the substitution of the new contract for the original one is at the option of the creditor, who has not chosen to exercise it.

It seems to me fairly clear that to allow the claim to recover the whole debt at once to be barred by time is a waiver of that claim, just as much as allowing it to be extinguished by express or tacit agreement; time in respect of the whole debt begins to run again from the date on which that claim is first irrevocably extinguished, according to Art. 75 of the First Schedule of the Limitation Act, though the amount of the whole debt is reduced by the amount

(1) [1912] 8 N. L. R. 44=14 I. C. 685.

(2) A. I. R. 1924 Nag. 61=19 N. L. R. 170.

(3) [1908] 30 All. 123=5 A. L. J. 72=(1908) A. W. N. 36.

(4) [1913] 35 All. 455=20 I. C. 933=11 A. L. J. 664.

(5) [1919] 41 All. 104=17 I. C. 926=16 A. L. J. 929.

(6) A. I. R. 1926 Cal. 789=53 Cal. 277.

that has become irrecoverable under Art. 74 of the same Schedule, as well as by the amounts that have been actually paid. But we are not concerned here with a claim to recover the unpaid amount of the whole debt, intact or reduced, but with a claim to recover certain instalments, which is undoubtedly within time.

The decree of the lower appellate Court will accordingly be set aside and that of the first Court will be restored. The defendants will pay the whole of the costs in all three Courts. The pleader's fee in this Court will be thirty rupees.

Appeal allowed.

*** A. I. R. 1927 Nagpur 30**

HALLIFAX, A. J. C.

afterwards

KOTVAL AND PRIDEAUX, A. J. Cs.

Chindhu—Defendant—Appellant.

v.

Rameswarnath and others—Plaintiffs—Respondents.

Second Appeal No. 457 of 1921, Decided on 24th July 1924, from the decree of the Addl. Dist. J., Balaghat, D/- 28th June 1921, in Civil Appeal No. 36 of 1920.

(a) *C. P. Tenancy Act (1898), S. 46—Registration contravening S. 46 is ineffective.*

Registration in contravention of S. 46, Tenancy Act, is ineffectual whether it be brought about by the fraud of the parties to the document or effected owing to ignorance or inadvertence on the part of the registering officer. [P. 31, C. 1]

* (b) *Registration Act, S. 49—Registration in contravention of law must be ignored.*

Registration in contravention of any provision of law, whatever be the cause that led to the contravention, is ineffectual and must be ignored: 13 N. L. R. 165, *Foll.*; 8 N. L. R. 22, *Expl.* [P. 31, C. 2]

A. C. Roy—for Appellant.

J. C. Ghosh—for Respondents.

Order of Reference.

Hallifax, A. J. C.—The property in dispute in this case is an occupancy holding in the village of Chacheri in Balaghat of which the plaintiffs-respondents are the malguzars. The remaining order of the lower appellate Court shows very great confusion between Rs. 23, 24 and 25 of O. 41 of the Civil P. C. The discussion in the first Court as to the validity of the adoption of Atmaram by Kolhu was, as

the learned Additional District Judge pointed out, irrelevant, and the finding of that Court that Chindhu was not in possession before 1915-16 through various sub-tenants can only mean that the possession was with Maharu who denies it or Atmaram who had left the villages before 1910. These matters, however, do not affect the case.

It has not been shown that Maharu and Kolhu were in any way related or that any ancestor, even the father of either of them, ever occupied the holding. It will be convenient to speak of Atmaram as the occupancy tenant of the holding in 1910, though it is just barely possible that the real tenant was the widow of Kolhu; as, however, she joined in the transfer made by Atmaram that makes no difference. It has also to be accepted as true that Maharu was in no way related to Atmaram or Kolhu.

The facts with which we are now concerned are these. On the 2nd of March 1910 Atmaram the occupancy tenant transferred the holding for Rs. 100 by a registered deed of sale to Maharu, describing him untruly as the great-grandson of his own great-grandfather and the next heir to the ancestral holding. Maharu sold it on the 26th of October 1910 for Rs. 85 to the defendant Chindhu, to whom he is not related. Chindhu took possession not later than June 1915, though Atmaram was still shown in the village papers as the tenant, and also in the settlement parcha issued in 1915-16. This settlement entry Chindhu got corrected by a suit filed against Atmaram in 1918. The malguzars of the village filed the present suit against Chindhu on the 11th of February 1920 claiming to eject him on the ground that he had been in wrongful possession of the holding since June 1916.

The decision of the learned Additional District Judge is in effect as follows. The transfer by Maharu to Chindhu who is not his heir, was forbidden by S. 46 of the Tenancy Act 1898; but it could be avoided only by application to a Revenue Officer in the manner and to the extent provided by Ss. 47 and 45 of that Act, as was explained in *Ganeshdas v. Shankar* (1) so far as a civil Court is concerned therefore it is a good transfer. But the previous transfer by Atmaram to Maharu for Rs. 100 required registration of the

(1) [1912] 8 N. L. R. 22=13 I. C. 903.

sale deed, and the registration that was in fact effected must be treated as not having been effected at all; an unregistered sale for Rs. 100 or more is void under the ordinary civil law and not only under the Tenancy Act, and, therefore, the transfer must be treated as void in a civil Court without being set aside by a Revenue Officer. Mahar's title failing, Chindhu could derive none from him. The claim for possession was accordingly decreed.

The learned Judge's decision is in accordance with the ruling of Ismay, J. C., in *Daji Vithal Dhok v. Moreshwar Venkatesh Gharpurey* (2). Stanyon, A. J. C., dissented from this ruling in *Ganeshdas v. Shankar* (1) but Drake-Brockman, J. C., followed it in preference to the later one in *Nilkant v. Ghulya* (3). The convention of this Court being bound by its own published rulings till they are overruled by a Bench had apparently not then been established. In these circumstances clearly the only possible course for me is to refer this point of law for decision by a Bench. My own present opinion on it is that as the transfer by Mahar to Chindhu can be avoided only for an assumed and not an actual want of registration and as that assumption arises solely out of the provisions of S. 46 of the Tenancy Act, the ruling in *Ganeshdas v. Shankar* (1) is correct.

Opinion—Kotwal and Prideaux, A. J. Cs.—The facts are given in the learned referring Judge's order. So far as the law applicable to these facts is concerned, we do not think that there is any difference of opinion between the Judges who decided *Daji Vithal Dhok v. Moreshwar Venkatesh Gharpurey* (2) and *Nilkant v. Ghulya* (3) and the Judge who decided *Ganeshdas v. Shankar* (1). According to the first two of those decisions registration in contravention of S. 46, Tenancy Act, is ineffectual whether it be brought about by the fraud of the parties to the document or effected owing to ignorance or inadvertence or the part of the registering officer. According to the third it would be ineffectual if procured by fraud (vide page 26 of 8 N. L. R.) but not if it is made through inadvertence or ignorance. As in the present case it must be held that registration was brought about by fraud,

Mahar's relationship with Atmaram being untruly described in the sale deed, the civil Court had jurisdiction.

The decision in *Ganeshdas v. Shankar* (1) differs from the other two decisions only as regards the question whether registration made in contravention of S. 46 owing to ignorance or inadvertence on the part of the registering officer should be treated by the civil Courts as ineffectual in law. We are of opinion that registration in contravention of any provision of law, whatever be the cause that led to the contravention, is ineffectual and must be ignored. We agree with the view taken in *Nilkant v. Ghulya* (3) and the reasons given in support of that view. If the registration is ignored there is no transfer in cases where registration is necessary and the jurisdiction of the civil Court is not barred.

Appeal dismissed.

A. I. R. 1927 Nagpur 31

PRIDEAUX, A. J. C.

Ramprasad and others—Defendants—Appellants.

v.

Haridas—Plaintiff—Respondent.

Second Appeal No. 117 of 1925
Decided on 6th August 1926, from the decree of the Dist. J., Saugor, D/- 15th January 1925, in Civil Appeal No. 112 of 1924.

(a) *Execution—Objections should be taken in the Court passing the decree and not in transferee Court for execution—Civil P. C., S. 39.*

Objections for questioning the execution of the decree can be entertained only by the Court passing the decree and not by the Court to which the decree is transferred for execution. [P 32, C. 1]

(b) *Civil P. C., O. 23, R. 3—Compromise can be entered into in execution—Executing Court is bound to give effect to it—Article applicable for execution of adjusted decree is Art. 182 (4) and under Cl. (6) three years would be allowed for payment—Execution—Limitation Act, Art. 182.*

A compromise can be entered into much in the same manner as in a regular suit in execution proceedings, which does not extinguish the decree; and the Court executing the decree is bound, subject to the conditions indicated by O. 23, R. 3, to give effect to the compromise; and after recording such a compromise the decree is adjusted and the decree to be executed is the adjusted decree. The limitation applicable in such a case is that contained under Art. 182, Cl. (4), and under Cl. (6) of the same article

(2) [1905] 1 N. L. R. 112.

(3) [1917] 13 N. L. R. 165=42 I. C. 384.

there would be a period of three years allowed for the issue of the notice to the judgment-debtor to pay under the decree. . . [P 32 C 1, 2]

G. L. Subhedar—for Appellants.

M. B. Niyogi—for Respondent.

Judgment.—In this case the respondent obtained a decree in the Bombay Small Cause Court on the 21st January 1918, and the first application for execution was filed on 30-6-20. In the column "Relief asked for" it is stated:

The issue of a renewed judgment notice with order for the service of the same on defendant by registered post at Damoh, C. P.

Nothing seems to have been done beyond this and the case was struck off. A second application was made on 9-3-21, asking for the transfer of the decree from the Bombay Small Cause Court to the Court of the District Judge, Saugor. It was transferred. Then a third application dated 17-1-24 was made in Bombay asking for a renewal of the judgment notice. Nothing seems to have been done. Then an application was put in stating that a compromise had been come to by defendant promising to pay Rs. 100 a month. Then the application dated the 23-2-24, upon which these proceedings started, was filed, and a certificate granted by the Bombay Court to the Damoh Court.

It is now contended that the present application is not maintainable because the previous applications were not according to law and did not save limitation. It seems to me that there are grave objections for questioning the execution of the decree in Bombay on the grounds here alleged when that decree has been transferred to these provinces for execution. It is obvious that the Bombay Court was of opinion that the decree still existed and that its execution is not barred by time. And if the appellant attacks the transfer he should do so in the Bombay Court and not here. In *Muhammad Sulaiman v. Jhukki Lal* (1) it was held that such a compromise can be entered into much in the same manner as in a regular suit and that such a compromise does not extinguish the decree; and further that the Court executing the decree is bound, subject to the conditions indicated by S. 375 of the old Code, to give effect to the compromise. And it is here contended that this compromise being agreed to by the Bombay Court, it was adjusted,

(1) [1889] 11 All. 228=(1889) A. W. N. 53.

and that the decree now to be executed is the adjusted decree; and further that the limitation applicable is that contained under Art. 182, Cl. 4, second schedule, of the Limitation Act, and the present application is in time. There seems some force in this contention and under Cl. 6 of the same article, there would be a period of three years allowed for the issue of the notice to the judgment-debtor to pay under the decree. No grounds exist for interference in second appeal, and I decline to interfere.

The result is that this appeal fails and is dismissed with costs. Appellants will pay respondent's costs. I fix pleader's fees at Rs. 15.

Appeal dismissed.

A. I. R. 1927 Nagpur 32

KINKHEDE, A. J. C.

Balkrishna—Plaintiff—Appellant.

v.

Sadasheo and another—Defendants—Respondents.

First Appeal No. 2-B of 1925, Decided on 20th August 1926, from the decree of the Addl. Dist. J., Amraoti, D/- 20th October 1924, in Civil Suit No. 27 of 1923.

(a) *Practice—Evidence—Claimant must give prima facie proof of his claim.*

A claimant cannot succeed without giving prima facie proof in support of his case whether he be a plaintiff or a defendant. [P 33 C 2]

(b) *Civil P. C., O. 1, R. 10—Transposition of parties is contemplated and can be made even after decree in partition suit.*

The provisions of O. 1, R. 10, are sufficiently wide to permit transposition of plaintiff to defence side and vice versa. The power to strike out and add parties covers also a power to transpose them: 20 C. W. N. 752 and 32 Cal. 483, *Foll.*

This procedure is permissible even after a decree for partition: 35 Bom. 393, *Rel. on.*

If, owing to the continued absence of plaintiff, in a partition suit and his contumacious behaviour towards the defendants and his defiant attitude and disobedience of any orders lawfully passed by the Court or for any other good cause the Court is satisfied that the further progress of the suit is being impeded or delayed on that account, it is open to any of the defendants to move the Court to transpose him as the plaintiff and to make the plaintiff a defendant, and then take proper steps to work out the rights of the parties as declared by the preliminary decree against one another in the same suit.

(c) *Partition—Suit for—Defendant can avail of the suit by plaintiff as against other co-sharers.*

It is the independent and inherent right of each co-owner or member of a coparcenary who is impleaded as a party defendant to a suit for a general partition of joint property or joint family or coparcenary property, to avail himself, if he chooses, of the opportunity afforded by such a suit filed at the instance of the other co-owner or co-parcener, and seek the necessary relief of separation and partition of his own individual share from that of the plaintiff; and of the rest of the co-owners or coparceners interested in the joint or coparcenary property sought to be partitioned. [P 34 C 1, 2]

S. R. Mangrulkar—for Appellant.

R. R. Jaiwant—for Respondents.

Judgment.—I think the final decree which directs the plaintiff to pay to the defendants a certain amount of money on account of the value of moveable property set forth in the defendants' lists must be set aside and the case must go back to the lower Court for a fresh adjudication of the extent and value of such moveables after proper enquiry and consideration of evidence to be adduced in the case. The lower Court's procedure of accepting the defendants' lists of moveable property as correct without any evidence to support them is opposed to all principles of justice and commonsense. Plaintiff has filed his own lists and the defendants have filed theirs. If the respective lists did not tally and the defendants complained that the plaintiff's lists did not make a full disclosure of the value and extent of the moveables in his possession, and the defendants' lists sought to charge the plaintiff with possession of additional moveable property of a larger value than that admitted by the plaintiff, the ordinary course which the Court could have legally followed was to call upon the defendants to establish their assertion by giving prima facie proof in support of the correctness of the extent and details of the property as given by them. The lower Court could under no circumstances accept the defendants' lists as correct without such proof.

In *Gopala v. Ramkrishnapuri* (1), a somewhat similar procedure was followed by the District Judge who decided the case in appeal without caring to see whether the plaintiff had produced even prima facie evidence or not, or, at any rate, without considering the evidence on the subject. It was a suit by a co-sharer

malguzar against the lambardar for his share of village profits. The District Judge decreed the plaintiff's claim without considering any evidence, because he thought that the burden was on the defendant lambardar and he had failed to prove what his receipts were. Batten, A. J. C., while remanding the case observed that a case of this type cannot possibly be decided without any reference to the evidence whatsoever. What is a sufficient ground of prima facie proof on the part of the plaintiff (claimant) is a question of fact in each case. The appeal was, therefore, remanded for further trial to the District Judge. It will thus be seen that a claimant cannot succeed without giving prima facie proof in support of his case whether he be a plaintiff or defendant.

From order-sheet dated 17-10-1924 of the lower Court it appears that the plaintiff and his pleader were absent on the day and possibly the plaintiff had failed to do certain acts and fulfil certain necessary conditions for the further progress of the suit. In spite of this the Court proceeded to examine one witness for the defendants in the absence of the plaintiff and recorded in the order-sheet the following order regarding the moveables:

"About moveables my previous order revives." Evidently the Court meant to revive its order dated 30-9-24 wherein it recorded its opinion that it was

advisable to appraise them (moveables) in money value as given in this record as per defendants' list and award money value to the defendants

and possibly also its order dated 1-10-24 wherein it imposed a condition on the plaintiff while granting his counsel two days time to produce plaintiff in person before it. The adjournment granted was thus conditional upon the plaintiff being

willing to partition all the moveables within 8 or 10 days from that date (3-10-24) and in default, to apportion money value to defendants for their shares as valued by them.

It must be borne in mind that on 30-9-24 the plaintiff and his pleader were absent, and that on 1-10-24 Mr. Deorankar appeared and agreed to bring the plaintiff before the Court on 3-10-24. The plaintiff appeared on 3-10-24 and made his statement, and expressed his willingness to partition the moveables and the Court accepted his and his coun-

(1) [1919] 15 N. L. R. 85=50 I. C. 930.

sel's assurance as the order-sheet of that date shows. The condition was thus fulfilled and the penalty attached to his default become inoperative and unenforceable. However expedient orders of coercive nature such as these may be in the circumstances of the case, they are highly irregular and cannot be called judicial orders. The proper procedure to follow under such circumstances is laid down by O. 17, Rr. 2 and 3 of the Civil P. C., and the Court should have had recourse to it. Moreover, if owing to the continued absence of plaintiff and his contumacious behaviour towards the defendants and his defiant attitude and disobedience of any orders lawfully passed by the Court or for any other good cause, the Court was satisfied that the further progress of the suit was being impeded or delayed on that account it was open to any of the defendants to move the Court to transpose him as the plaintiff and to make the present plaintiff a defendant, and then take proper steps to work out the rights of the parties as declared by the decree against one another in the same suit.

That such a procedure is permissible and frequent in partnership cases, *Brojendra Kumar v. Gobinda Mohan* (2) and also in partition cases, *Jotindra Mohan v. Bejoy Chand* (3), is clear. The provisions of O. 1, R. 10, Civil P. C. are also sufficiently wide to permit recourse to such a procedure because the power to strike out and add parties covers also a power to transpose them. The power to add parties after a decree for partition was exercised in *Lakhmichand v. Gulabchand* (4), and to transpose a defendant as a plaintiff in the aforesaid Calcutta case reported in 32 Calcutta.

It must be understood that it is the independent and inherent right of each co-owner or member of a coparcenary who is impleaded as a party defendant to a suit for a general partition of joint property or coparcenary property, to avail himself, if he chooses, of the opportunity afforded by such a suit filed at the instance of the other co-owner or coparcener and seek the necessary relief of separation and partition of his own individual share from that of the plaintiff, and of

the rest of the co-owners or coparceners interested in the joint or coparcenary property sought to be partitioned. The defendants not having availed themselves of this right or followed the proper procedure, the decree awarding them money value for the moveables against the plaintiff cannot stand. The lower Court's final decree is, therefore, set aside so far as it relates to the moveable property valued at Rs. 6,110-8-0 and the case is reopened to that extent and remanded for disposal according to law with advertence to the above remarks.

The appellant shall get a refund of the Court-fee paid on his memorandum of appeal, his other costs will be borne by him, respondents bearing their own. The order of the lower Court saddling all costs on plaintiff is also set aside and it is ordered that the costs of the proceedings hitherto incurred in the first Court will be borne by the parties incurring them as provided for in para. 8 of the compromise petition except the commissioner's fee which will be borne half and half. Costs which will be hereafter incurred as regards moveable property will of course abide the event. As the costs of the Official Receiver have not been ascertained I leave the question of their payment or apportionment to the lower Court.

Case remanded.

A. I. R. 1927 Nagpur 34

PRIDEAUX, A. J. C.

East Indian Railway Co., Calcutta—
Defendant 2—Appellant.

v.

Ahmad Ali Mohammad—Plaintiff—
Respondent.

Second Appeal No. 201 of 1925, Decided on 28th August 1926, from the decree of the Addl. Dist. J., Damoh, D/- 28th January 1925, in Civil Appeal No. 65 of 1924.

(a) *Railways Act, S. 72—Risk note B—Consignor must prove wilful neglect of the Company—“Wilful neglect” implies purposeful omission to do a certain act.*

In cases concerning risk note the burden lies on the consignor to prove that there was wilful neglect by the Railway Company or its servants or theft by its servants.

The term “wilful neglect” implies an intentional and purposeful omission to do a certain

(2) [1916] 20 C. W. N. 752=34 I. C. 186.

(3) [1905] 32 Cal. 483.

(4) [1911] 35 Bom. 393=11 I. C. 559=13 Bom. L. R. 517.

act. It is an even more extreme term than gross and culpable negligence and implies that an individual deliberately refrains with his eyes open from doing an act or taking a step which it is his duty to take : *A. I. R. 1926 Nag. 296, Foll.*

[P. 35, C. 2]

(b) *Railways Act, S. 72—Risk note B—"Robbery"*.

The term "robbery" in the risk note includes theft from running train. [P. 35, C. 2]

*A. V. Khare and W. B. Pendharkar—*for Appellant.

*G. L. Subhedar—*for Respondent.

Judgment.—The plaintiff firm at Calcutta sent 127 bags of sugar weighing 349 maunds and 10 seers from the Kidderpore Docks, E. I. Ry., to the plaintiffs at Damoh, on the G. I. P. Ry. on 14-11-23, covered by a risk-note. On arrival of the consignment at Damoh only 116 bags were delivered to the plaintiffs, containing 319 maunds of sugar. Plaintiffs sued for the 32 maunds and 2 seers of sugar or its price, Rs. 661, with interest. The claim was denied though the loss was admitted, it being contended that the loss was not due to any negligence, wilful or otherwise, on the part of the defendants, or theft by defendants' servants; and the consignment being carried at owner's risk-note form B, plaintiffs were not entitled to recover.

The case went to trial on the following issues :

(1) Whether the defendants are protected and not liable for the non-delivery of 11 bags of sugar as alleged ?

(2) Whether the risk note was executed by the plaintiff or his consignor.

(3) Whether there was short weight of 2 maunds 32 seers of consignment delivered. If so, are defendants liable for it ?

(4) Whether the rate of sugar was not Rs. 20 per maund.

(5) Is the plaintiff entitled to interest ?

(6) To what relief are the parties entitled ?

The trial Court's finding may be summarized as follows : The defendants were not protected by the risk note with regard to the eleven missing bags though they were not liable for the sugar missing from the other bags. A decree including interest for Rs. 619-12-0 was passed. The Judge found that the loss of eleven bags was proved, it having occurred between Kidderpore and Satna. He disbelieved, and with reason, the guard's story that the theft took place between Tikori and Satna, a distance of five miles and a run of 26 minutes. The guard's own report showed that the seals

of the waggon were last checked at Manipur, between which station and Satna are three stations, Tikoria, Jaitwar and Tikori, instead of at each station as the rules laid down. The guard was held to have wilfully neglected his duty.

On appeal it was found that 11 bags were lost between Tikori and Satna stations, and lost through the wilful negligence of the guard. The learned Judge apparently took the guard's statement at its face value, entirely ignoring Exhibit D. 2. The appeal was dismissed.

I must send the case back. A definite finding must be come to as to how and when the loss occurred. In these cases of a risk note the burden lies on the consignor to prove that there was wilful neglect by the Railway Company or its servants or theft by its servants. As held in *Wali Mohammad v. Bengal North-Western Ry. Co.* (1) the term "wilful neglect" implies an intentional and purposeful omission to do a certain act. It is an even more extreme term than "gross and culpable negligence" implying that an individual deliberately refrains with his eyes open from doing an act or taking a step which it is his duty to take. It has to be remembered that when a special contract such as a risk-note exempts the Railway Company from all liability, except in certain specified cases, the plaintiffs can only succeed by showing that their case comes within those exceptions. I would invite the lower appellate Court's attention to the following case : *B. B. and C. I. Railway Company v. Ranchhodlal Chhotatal* (2). The term "robbery" in the risk-note includes theft from a running train.

With these remarks I remand the appeal to the lower appellate Court for further consideration and a fresh decision. Costs will abide the result.

Case remanded.

(1) *A. I. R. 1926 Nag. 296.*

(2) [1919] 48 Bom. 769=52 I. C. 516=21 Bom. L. R. 779.

* A. I. R. 1927 Nagpur 36

KOTVAL, O. J. C.

Chindha—Defendant—Appellant.

v.

Narayan Govind Rao—Plaintiff—Respondent.

Second Appeal No. 485 of 1925, Decided on 10th August 1926, from the decree of the District J., Nagpur, D/- 25th September 1925, in Civil Appeal No. 93 of 1925.

* (a) *Civil P. C., O. 21, R. 35—Possession delivered—Judgment-debtor remaining in possession for all practical purposes—Decree-holder's remedy is by suit for possession.*

Where the decree-holder is entitled to khas possession under the decree and such possession is given to him in execution then the fact that the judgment-debtor was for all practical purposes in possession in spite of the delivery of possession to the decree-holder under the warrant does not necessarily lead to the conclusion that the possession delivered was not khas possession, and if the decree-holder is subsequently dispossessed, his remedy is by suit. Even if the possession delivered to the decree-holder was only formal or symbolical, it makes no difference: 28 All. 722, *Rel on.* [P. 36, C. 1, 2]

(b) *Mesne profits—Measure—Rent is no criterion.*

The rent payable to the landlord is no criterion of the letting value for purposes of ascertaining the mesne profits. [P. 36, C. 2]

G. P. Dick—for Appellant.

M. R. Bobde—for Respondent.

Judgment.—The plaintiff-respondent obtained a decree for possession of the fields in suit against the defendant-appellant. He alleges that after being put in possession in execution proceedings he was dispossessed by the defendant. He therefore again sues for possession and mesne profits. The defendant pleads that the plaintiff's remedy is by way of execution and not by separate suit. He pleads that the plaintiff did not obtain possession in execution and was not dispossessed.

The lower Courts have held that the plaintiff has a remedy by separate suit. The defendant appeals against this finding.

It is clear from Ex. P-1, the warrant for possession, that the plaintiff was put in possession on the 18th July 1922. The plaintiff was entitled to khas possession under the decree which was being executed and presumably such possession was given to him. There is evidence that he ran his plough through the fields. The

fact that the defendant was for all practical purposes in possession in spite of the delivery of possession to the plaintiff under the warrant does not necessarily lead to the conclusion that the possession delivered was not khas possession. The possession may have been only momentary, nevertheless it was khas or physical possession. That being so the decree was completely executed and the plaintiff could not ask the executing Court for any other relief. Even if the possession was only formal or symbolical, *Jagan Nath v. Milap Chand* (1) is an authority for holding that the plaintiff could recover khas possession by a suit. The appeal therefore fails.

The plaintiff has filed a cross-objection with regard to mesne profits which the first Court had allowed but the lower appellate Court has disallowed. It is urged that the latter Court has disregarded the view enunciated in *Jailal Sao v. Lal Fateh Singh* (2) as to the burden of proof in a suit for mesne profits. The plaintiff claimed what he stated would be the actual profits of the land in dispute which the defendant would, with ordinary diligence, have received. The defendant alleged that he received no profits at all during the period for which they were claimed. Both parties adduced evidence of actual profits only and the lower Courts decided the point on the basis of such evidence. The lower appellate Court has accepted the evidence of the plaintiff's witnesses and upon that evidence has held that there were no profits. I do not see how under these circumstances the view in 20 N. L. R. 52 can be said to have been disregarded. There is no evidence on the record as to the letting value of the field. The rent payable to the landlord is no criterion of the letting value and was never referred to in the pleadings as such criterion. The cross-objection also fails.

The appeal and cross-objection are both dismissed with costs.

Appeal dismissed.

(1) [1906] 28 All. 722=3 A. L. J. 504=1906 A. W. N. 213.

(2) A. I. R. 1924 Nag. 117=20 N. T. R. 52.

* A. I. R. 1927 Nagpur 37

KINKHEDE, A. J. C.

Tukaram Bajirao — Plaintiff—Appellant.

v.

Tukaram Yeshwant—Defendant—Respondent.

Second Appeal No. 140-B of 1925, Decided on 25th August 1926, from the decree of the Addl. Dist. J., Yeotmal, D/- 3rd February 1925, in Civil Appeal No. 81 of 1924.

* *Limitation Act, Art. 142—Plaintiff dispossessed within 12 years of suit—Plaintiff must prove that he was in possession before he was dispossessed—No proof that defendant was in possession for full 12 years—Presumption is that plaintiff was in possession.*

The law presumes that possession follows title and does not favour forcible entry into possession by trespassers. Further, the presumption is prospective rather than retrospective in operation. The presumption of continuity has an operation in the future, because if it be shown that a particular state of things was existing at a particular time, that state of things will be presumed to continue in the absence of anything to the contrary.

Where in an ejectment suit the plaintiff alleges dispossession by defendant within 12 years, the onus of proving plaintiff's possession prior to his dispossession lies upon him, but in the absence of any proof of defendant's possession for the full statutory period the initial fact of the appellant's title comes to his aid and with greater or less force according to the circumstances established in evidence : 16 M. L. J. 272 (P. C.), *Foll.*

[P 37, C 1, 2]

M. B. Niyogi—for Appellant.*R. R. Jaiwant*—for Respondent.

Judgment.—The only question to be decided in this case is whether simply because the plaintiff proved his title to the property and the defendant did not prove when he actually began his forcible cultivation of the plaintiff's land, there is any presumption that possession was with plaintiff during the last 12 years before suit. The lower appellate Court has refused to draw any such presumption in plaintiff's favour, but, on the contrary, it has considered it more probable that because the defendant is admittedly in possession since 1915 he must have commenced his cultivation some time before that. I think this reasoning is faulty. The presumption is prospective rather than retrospective in operation. The presumption of continuity has an operation in the future, because if it be shown that a particular state of things

was existing at a particular time, that state of things will be presumed to continue in the absence of anything to the contrary.

The present suit was filed in 1923 when the plaintiff was admittedly out of possession for eight years. The defendant alleges plaintiff was never in possession and that he himself was in adverse possession all along. The law presumes that possession follows title and does not favour forcible entry into possession by trespassers. Thus the question is whether the plaintiff should be presumed to have enjoyed possession of the land in suit during the four years preceding 1915 or the law will presume that the trespasser came upon the land at a much earlier point of time than that admitted by plaintiff. In short, the appellant admits defendant's possession for eight years while the defendant says he was in possession for 12 years and longer. The difference between the admitted possession and the period of limitation being so narrow (four years) the question of onus is important. Reading the findings of the lower appellate Court very carefully I am inclined to think that the inference properly arising therefrom is that the land was then lying vacant and not occupied by the defendant. The mere circumstance that land is fit for cultivation does not place the owner under an obligation to cultivate it on pain of losing it if left uncultivated. The owner may have no present use of the land. The law cannot be so unreasonable to compel every owner to cultivate the land. I cannot therefore agree with the lower appellate Court's finding that probably defendant was in possession prior to 1915.

In *Rani Hemanta Kumari Debi v. Maharaja Jagadindra Nath Roy Bahadur* (1) their Lordships of the Privy Council laid down the following proposition :

Where in an ejectment suit the plaintiff alleged dispossession by defendant (as in this case) eleven years before suit, the onus of proving plaintiff's possession prior to his dispossession lies upon him and in this question of evidence, the initial fact of the appellant's title comes to his aid and with greater or less force according to the circumstances established in evidence.

(1) [1906] 16 M. L. J. 272=8 Bom. L. R. 400=3 A. L. J. 363=10 C. W. N. 630 (P. C.).

Applying these principles to the facts as found in this case, I think the initial fact of plaintiff's title must come to his aid and the presumption that possession follows title must supply the place of positive evidence of possession.

The plaintiff's appeal is allowed and the claim is decreed with costs throughout.

Appeal allowed.

*** A. I. R. 1927 Nagpur 38**

KINKHEDE, A. J. C.

Balwant—Defendant 2—Appellant.

v.

Manohardas Rangildas and another—Plaintiff and Defendant 1—Respondents.

Second Appeal No. 54-B of 1924, Decided on 29th July 1926, from the decree of the Dist. J., Akola, D/- 3rd December 1923, in Civil Appeal No. 12 of 1923.

** Mortgage — Suit by subsequent mortgagee without impleading prior mortgagee — No relief in respect of prior mortgage sought—Court should not go into the validity or existence of prior mortgage—Any decision given is not binding.*

It is open to a second mortgagee to sue for and obtain a decree for sale of the property covered by his own mortgage without impleading the prior mortgagee of the same property; the effect of a decree based on a second mortgage is only to direct sale of such rights of the mortgagor as existed at the date of that mortgage, the rights of the prior mortgagee being in no way affected by it. The property is necessarily sold subject to the pre-existing rights under the prior mortgage. If the second mortgagee wants the mortgaged property to be sold free of the prior encumbrance and if he had reason to think that the prior mortgage was either non-existent or fictitious or invalid for any reason, it is open to him to challenge it and he might frame his suit differently and ask that a decree directing sale of the property free of the so-called prior encumbrance be passed in the suit, and in that case, if the person who relies upon the prior mortgage fails to prove it, the second mortgagee would be entitled to a decree directing the sale of the property free of the prior encumbrance. But where he does not seek that relief, it is wholly unnecessary to go into the question of the existence or validity of the prior mortgage and if the Court has through inadvertence decided it, the decision is not binding on the defendant: 26 *Mad.* 760; 2 *N. J. R.* 94 and *A. I. R.* 1924 *Nag.* 429, *Ref.* [P 39 C 1, 2]

W. R. Puranik and Shinde—for Appellant.

A. S. Athalye—for Respondent No. 1.

Judgment.—Plaintiff-Respondent No. 1 which is a firm of Rangildas Wallabdas sued on the basis of a mortgage dated

12-6-16 executed by Defendant No. 1 for recovery of the debt due thereunder by sale of the mortgaged house. The present appellant was impleaded as Defendant No. 2 on the ground that he was a subsequent auction-purchaser of the property covered by the mortgage. This auction sale had taken place on 13-11-20 in execution of a mortgage decree obtained by one Ratanlal upon a mortgage dated 5-4-1917 executed by Defendant No. 1. The Defendant No. 1 appeared in the Court of first instance and admitted the plaintiff's claim in full. Defendant No. 2 denied the plaintiff's mortgage and put him to proof of the same. He pleaded in the alternative that though he was an auction-purchaser under the decree based on Ratanlal's later mortgage, he was entitled to fall back upon the prior mortgage of Nawarangrai Pannalal of 1914 satisfied by Ratanlal out of the consideration of the mortgage of 1917 and that the plaintiff could not claim to sell the property without redeeming him. Plaintiff in his turn denied the execution of the mortgages of 1914 and 1917 and urged that he was not bound to redeem the prior mortgage of Nawarangrai Pannalal even if it be held that it was prior to his own and was satisfied as alleged.

The plaintiff's mortgage was held to have been duly executed and attested, whereas as regards the mortgages of 1914 and 1917 it was held that their execution was not proved. As regards the plea of satisfaction of the mortgage of 1914 out of the consideration of the mortgage of 1917 it was held that the mortgagee Ratanlal did not pay off mortgage of Nawarangrai but that the Defendant No. 1 borrowed the amount from Ratanlal and himself redeemed the mortgage of Nawarangrai by payment of Rs. 3,854, and that consequently the case was not covered by S. 74 of the Transfer of Property Act. In this view of the case the first Court held that the Defendant No. 2 could represent only the subsequent mortgagee Ratanlal and not the prior mortgagee Nawarangrai and as such was not entitled to be redeemed. The plaintiff was accordingly granted a decree for sale of the mortgaged property under O. 34, R. 4, Civil P. C.

Against this decree the Defendant No. 2 appealed to the Court of the District Judge, Akola, and urged that the decree

in plaintiff's favour should have been made conditional on his redeeming the prior mortgage of Nawarangrai. The learned District Judge held that in the absence of any evidence as to the due execution and attestation of the mortgage bond of 1914 the defendant was not entitled to call upon plaintiff to redeem it. The District Judge agreed with the lower Court in holding that it was the Defendant No. 1 and not Ratanlal who paid Rs. 3,854 out of the consideration of the mortgage of 1917 in satisfaction of the prior mortgage. The appeal was accordingly dismissed. The appellant has therefore come up in second appeal.

It is urged that the Courts below have unnecessarily called for proof and gone into the question of the existence and validity of the prior mortgage of 1914 in view of the fact that the plaintiff although expressly invited to redeem the prior mortgage refused to do so and failed to ask for an amendment of the plaint so as to convert his suit for sale into one for redemption of the prior mortgage also. I think this contention must prevail. What is meant by this contention is that whatever decision has been given in this case should be treated as wholly unnecessary for the proper adjudication of the suit as laid and therefore not binding as between the parties, inasmuch as, under law, it is open to a second mortgagee to sue for and obtain a decree for sale of the property covered by his own mortgage without impleading the prior mortgagee of the same property; the effect of a decree based on a 2nd mortgage is only to direct sale of such rights of the mortgagor as existed at the date of that mortgage, the rights of the prior mortgagee being in no way affected by it. The property is necessarily sold subject to the pre-existing rights under the prior mortgage. This was really the simple nature of the plaintiff's suit and would have also been the scope of the decree he asked for in the plaint. If he had reason to think that the prior mortgage of 1914 was either non-existent or fictitious or invalid for any reason, it was open to him to challenge it and he might have framed his suit differently and asked that a decree directing sale of the property free of the so-called prior encumbrance be passed in the suit, and in that case, if the defendant who relied upon the prior

mortgage had failed to prove it, the plaintiff would have been entitled to a decree directing the sale of the property free of the prior encumbrance. But as such is not the case here, the adjudication is wholly unnecessary. Merely because the parties have chosen to go into the matter of the existence of the prior mortgage and the Court inadvertently decided it, the present suit has not and cannot be deemed to have been converted into a combined suit for sale and redemption, inasmuch as there is no amendment of the plaint or payment of the necessary Court-fee to cover such reliefs. The decision in a suit must ordinarily depend upon the nature of the relief asked for in the plaint. In the absence of any amendment of the plaint I am not prepared to go to the length of holding that the plaintiff intended to ask for or the Court was empowered to grant a decree directing sale of the property free of the prior mortgage of 1914 which is really the effect of the present decision. If the parties had been careful enough, at the earlier stage of the case, the scope of the suit could and would have been defined with precision, and the defence based on the prior mortgage left over for future adjudication and the unfavourable decision avoided, unless the plaintiff had secured the leave of the Court to amend the plaint and asked for the appropriate relief, namely, that the property be sold for satisfaction of not only his own mortgage but also of the prior mortgage, he may have to redeem, or, in the alternative, that the property be sold to satisfy his mortgage free of the first mortgage in the event of the same not being established or being found to be invalid: cf. *Laxman v. Janoo* (1).

I therefore hold that Defendant No. 2's failure to establish the mortgage of 1914 here does not preclude him from establishing it as against the present plaintiff whenever the necessity to rely upon it might hereafter arise. It may be pertinent to point out here that this case is analogous in principle to a case, where it is held that adjudication on the question of title in a suit for possession based on a contract of lease on the ground that the tenancy has come to an end, does not operate as *res judicata* in a subsequent title suit brought to eject the same defendant as a trespasser: *Ramaswami Ayyar*

(1) A. I. R. 1921 Nag. 429=20 N. L. R. 197.

v. *Vythinatha Ayyar* (2), quoted with approval in *Gopala v. Ania* (3).

In short, the position is that, so far as the prior mortgage of 1914 is concerned the rights of the parties must, in spite of the present unnecessary adjudication, be deemed to be still undecided. Viewed in this light the decree passed against the Defendant No. 2 does not touch him except as regards its operation against such interest as he has acquired qua representative of the subsequent mortgagee of 1917, as well as the mortgagor, so far as it directs the sale of the equity of redemption left in Defendant No. 1 at the date of the plaintiff's mortgage of 1916 which he cannot dispute. The decree appealed against must therefore stand good against him, but in order to avoid future disputes I think it desirable to declare that it will not prejudice any rights he may have and may hereafter establish on the basis of the alleged prior mortgage of 1914.

In this view of the case it is not necessary for me to decide the question how far the lower appellate Court was or was not justified in rejecting the appellant's petition dated 28-11-23 for admitting additional evidence at the stage of appeal. Although I uphold the above contention, it has not the effect of re-opening the decree appealed from. The appeal therefore fails on its merits and is dismissed. As I think it was open to the appellant to avoid this unnecessary adjudication in the trial Court itself by taking proper steps, I direct he shall bear all the costs of this appeal.

Appeal dismissed.

(2) [1903] 26 Mad. 760=13 M. L. J. 448.

(3) [1906] 2 N. L. R. 94.

A. I. R. 1927 Nagpur 40

KINKHEDE, A. J. C.

Abdur Rahim—Accused—Applicant.

v.

Emperor—Non-applicant.

Criminal Revision No. 297 of 1926, Decided on 19th August 1926, from the decision of the Dist. Mag., Nimar, D/- 8th June 1926, in Criminal Case No. 74 of 1926.

Penal Code, S. 411—"Knowing or having reason to believe"—Prosecution must prove facts from which such knowledge can be presumed.

The knowledge or belief which is required to be established in order to bring the case under

S. 411 implies the existence and the presence of facts or circumstances from which the accused was either made aware or ought to have been made aware of the nature of the property. It may be sufficient to show that the circumstances were such as to make him believe that the property was stolen. The word "knowledge" means a mental cognition and not necessarily visual perception. It implies a notice to the Receiver, of such facts as could not but have led him to believe that the property was stolen and could not but have been dishonestly obtained. It therefore lies on the prosecution to prove the presence of certain facts from which the accused might have drawn the inevitable conclusion that the property was stolen property. It is not sufficient in such a case to show that the accused person was careless or that he had reason to suspect that the property was stolen or that he did not make sufficient enquiry to ascertain whether it had been honestly acquired: 6 Bom. 402, *Foll.* [P. 41, C. 1]

Fida Hussain—for Applicant.

Order.—The applicant *Abdur Rahim* was with one *Hurmatbi* challaned by the police under S. 380 of the I. P. C. for theft of the complainant's articles, namely certain ornaments worn on her person by *Mt. Hurmatbi*. The trying Magistrate convicted him under S. 379 and sentenced him to three months rigorous imprisonment. He therefore went up in appeal to the District Magistrate, Nimar, against the conviction and sentence. The District Magistrate was of opinion that there was no evidence on record of the accused *Abdur Rahim* having committed the theft himself. He expressed the view that it was more probable that the earring was worn on her person by *Mt. Hurmatbi* and that she gave it to him, and that she was guilty of theft when she ran away with the belongings of her husband including the earring. In this view of the case he thought that the proper section under which the accused could be convicted was S. 411, I. P. C. instead of S. 379, and thinking he could, under S. 237 of the Criminal P. C., alter the conviction from S. 379 to S. 411 of the I. P. C. maintained the sentence and dismissed the appeal.

It is against this decision of the District Magistrate that the present application for revision is made. It is argued before me that what *Mt. Hurmatbi*, the wife of the complainant, had worn on her person was not stolen property in her hands, and if the applicant received it he did not thereby become a receiver of the stolen property, and further that in order to sustain the conviction under S. 411 it was necessary to the Court to

come to a finding that he had knowledge or belief that it was stolen property; in other words, it has to be found that the receiver received the identical property with the knowledge or belief that it was stolen. It is pointed out that the complainant himself admitted in his deposition that the ornaments were given by him to Hurmatbi at the nika and that the applicant had therefore no reason to believe that Hurmatbi was possessing the ornaments as property stolen from her husband's possession, but on the contrary he had reason to believe that she was the prima facie owner of the ornaments admittedly gifted to her at the nika. The knowledge or belief which is required to be established in order to bring the case under S. 411, I. P. C. implies the existence and the presence of facts or circumstances from which the accused was either made aware or ought to have been made aware of the nature of the property. It may be sufficient to show that the circumstances were such as to make him believe that the property was stolen. The word "knowledge" means "a mental cognition" and not necessarily "visual perception." It implies a notice to the receiver of such facts as could not but have led him to believe that the property was stolen and could not but have been dishonestly obtained.

It therefore follows that it lies on the prosecution to prove the presence of certain facts from which the accused might have drawn the inevitable conclusion that the ornaments in question worn and possessed by Mt. Hurmatbi, the wife of the complainant, were stolen property as defined in S. 410 of the I. P. C. It was therefore necessary for the prosecution to establish and for the District Magistrate to find, whether in this particular case, the circumstances were such that the accused, as a reasonable man, must have felt convinced in his mind that the property with which he was dealing must be stolen property: cf. *Empress v. Rango Timaji* (1). As observed by Melvill, J., in the aforesaid case it is not sufficient in such a case to show that the accused person was careless or that he had reason to suspect that the property was stolen or that he did not make sufficient enquiry to ascertain whether it had been honestly acquired. In *Sama-*

chari, In re. (2), which was a case under S. 414, I. P. C., it was held that in order to convict an accused person under S. 414, I. P. C., it is necessary that the property subject to the charge was stolen property and further that the accused should have known or had reason to believe that it was stolen property which they were trying to conceal or to make away with. Thus, it will be seen, that it is of the very essence of an offence under S. 411 or S. 414 that not only the property must be 'stolen property' but that the accused also knew or had reason to believe it to be stolen property.

Under these circumstances the conviction and sentence passed against the applicant cannot be upheld in the absence of a clear finding that the ornaments worn and possessed by Mt. Hurmatbi were stolen property and that the accused knew or had reason to believe that they were stolen property. I, therefore, set aside the conviction and sentence and remand the case with directions to frame a proper charge and to re-try the applicant in a Court of competent jurisdiction to which the District Magistrate may think fit to send him for trial. The accused who was on bail in this Court shall continue on bail. He is ordered to present himself before the District Magistrate on 26-8-26 in order that he may direct him to the proper Magistrate to have his re-trial.

Re-trial ordered.

(2) A. I. R. 1924 Mad. 350.

A. I. R. 1927 Nagpur 41

KINKHEDE, A. J. C.

Mohmad Sujat — Defendant — Appellant.

v.

Mt. Chandbi — Plaintiff — Respondent.

Second Appeal No. 262-B of 1924, Decided on 18th August 1926, from the decree of the Addl. Dist. J., Amraoti, D/- 5th July 1924, in Civil Appeal No. 98 of 1924.

(a) *Transfer of Property Act, S. 41* — Real owner must induce belief in the transferee that his transferrer had power to transfer—Mutation of names does not create title—Mutation.

It is of the essence of S. 41 that the conduct of the real owner must induce a belief in the transferee that his transferrer had power to make

(1) [1881] 6 Bom. 402.

the transfer. Mutation of names by itself creates no proprietary title: 31 All. 73 (P. C.), *Rel. on.*

Mutation is merely a statement of the facts which existed as to the possession of the property. Consequently it follows that neither the mutation entry nor the entry in the Record of Rights can supply the place of a title-deed, and a purchaser who acts upon such an entry as evidence of title does so at his risk; and it enhances the burden of proof which law lays on him to prove that he acted in good faith. [P. 42, C. 1, 2]

(b) *Civil P. C., S. 100—Finding of fact.*

The finding as to absence of reasonable care and good faith is a finding of fact. [P 42 C 2]

A. V. Khare and W. B. Pendharkar — for Appellant.

G. L. Subhedar—for Respondent.

Judgment.—One Sirdarkhan, who owned Survey No. 23 of mouza Shirajgaon, died several years ago leaving behind two sons Samdarkhan and Mastekhan and one daughter named Chandbi who is plaintiff-respondent in this case. The two brothers sold the field to one Baliram on 19th February 1922 and Baliram sold it to defendant-appellant on 10th February 1923. Plaintiff claims 1/5th share in that field. The defendant urged in the first Court that the plaintiff's claim was barred by limitation and also to protection under S. 41 of the Transfer of Property Act. The defence prevailed in the first Court and the suit was dismissed and the plaintiff therefore went up in appeal to the Additional District Judge, Amraoti. The Additional District Judge allowed the plaintiff's appeal and decreed the claim. It is against this decree that the defendant has come up in second appeal.

The Additional District Judge formulated the following points for consideration as being necessary to be established in a case coming under S. 41 of the Transfer of Property Act. The transferee has to prove: (1) that the real owner allowed another person to hold himself out as the owner of the field; (2) that the transferee purchased it for value from the apparent owner in the belief that he was the real owner, and that the real owner has to prove (3) either direct or constructive notice of the real title, or (4) circumstances which would put the transferee on inquiry which if prosecuted with due care and attention, would lead to the discovery of the real title.

It will thus be seen that it is of the essence of S. 41 that the conduct of the real owner must induce a belief in the

transferee that his transferrer had power to make the transfer. The Additional District Judge was right in the view which he took that mutation of names by itself created no proprietary title: see *Chokhey Singh v. Jote Singh* (1). Mutation is merely a statement of the facts which existed as to the possession of the property. Consequently it follows that neither the mutation entry nor the entry in the Record of Rights can supply the place of a title-deed, and a purchaser who acts upon such an entry as evidence of title does so at his risk; and it enhances the burden of proof which law lays on him to prove that he acted in good faith. If the title of the transferrers was based upon mere prior transfers and they had the custody of the title-deeds showing them as the apparent purchasers of the property, the matter would have been different, but here the title was by inheritance from a father and it was incumbent on the transferees to have used reasonable care in ascertaining whether the transferrers were the only persons on whom inheritance devolved or there were some other co-heirs including females. The fact that the transferrers were Mahomedans ought to have put the present defendant and his predecessors in interest on enquiry as to whether there was a female heir in addition to the two transferrers. The lower appellate Court has given very good reasons for holding that the original purchaser wholly avoided the knowledge of the vendor's title. This was nothing short of wilful abstention from enquiry upon a crucial point which affected the degree of reasonable care and good faith, which is necessary to be established by a person claiming the protection of S. 41, Transfer of Property Act. The finding as to absence of reasonable care and good faith on the part of the appellant and his predecessor is a finding of fact and I cannot go behind it in second appeal.

There is yet another reason why I should be disinclined to interfere in second appeal, and it is that the present appellant has, on the facts found, failed to prove that the possession of the plaintiff's two brothers was in any way adverse to her knowledge for over 12 years prior to the suit. On the contrary the lower appellate Court's finding is that until

(1) [1909] 31 All. 73=1 I. C. 166=36 I. A. 38 (P. C.).

Baliram purchased the field in 1922, plaintiff was in constructive possession of it through her brothers. In any case, the possession of the brothers was equivocal until 1922 and it was the present defendant's duty to show that it had become adverse long prior to that. Under these circumstances no proper case is made out for interference in second appeal.

The appeal fails and is dismissed with costs,

Appeal dismissed.

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KINKHEDE, A. J. C.

Mt. Yashodi—Accused—Appellant.

v.

King-Emperor—Opposite party.

Criminal Appeal No. 57-B of 1926, Decided on 10th August 1926, from the judgment of the S. J., Akola, D/- 21st June 1926, in Sessions Trial No. 14 of 1926.

Criminal trial — Evidence — Uncorroborated testimony of a witness cannot be disbelieved as to some accused and believed as to others.

The uncorroborated testimony of a witness which is disbelieved as to one accused should be discarded also as to the other accused whom he implicated; 3 *L.L.J.*, 147, *Foll.* [P 44, C 1]

*M. B. Niyogi—*for Appellant.

Judgment.—This is an appeal by one Yashodi convicted of murdering her full-grown new-born illegitimate child and sentenced to transportation for life. She is a widow for the last 10 years. On the night of the 29th April 1926 she gave birth to that child after the completion of the full period of nine months. The child was born alive as the medical evidence shows. While it lay in the compound of her house it was seen alive and crying by P. W. 1, P. W. 2. The medical evidence given by P. W. 6 also shows that the mouth, oesophagus and pharynx were stuffed with earth, and some earth was also found in the stomach. In the opinion of the Assistant to the Civil Surgeon (P. W. 6) the death was in all probabilities due to suffocation with earth in mouth and back of throat. The sole question is who murdered the child.

It must be mentioned here that the

appellant had during her husband's time borne him two legitimate children, and since his death she has had 3 illegitimate offsprings. The eldest illegitimate offspring is in the Pandharpur asylum. The 2nd was entrusted to one woman but died later on, and the third is the one with whose murder she stands charged. It is argued by the appellant's advocate that Yashodi was accustomed to the disgrace which was likely to attach to her in the eyes of the public for having given birth to illegitimate progeny so that it does not furnish a motive for her to commit the crime. She was already outcasted by the community. She had no cause to be afraid of it now. Then again the evidence on record shows that one Yadorao who is behind the scene has been planning with the help of his other relations like Rambhau and Balkrishna and partisans like the Patwari, to oust Yashodi from her position as the natural guardian of her legitimate son, and that in fact proceedings are still pending. The Patwari has evinced a very great personal interest in this affair. He went out of his way to make the report personally in the company of Yadaorao (see P. W. 10's deposition). To my mind the evidence of Nathu (as also of his wife Radhi) is highly tainted by his being in league with these people. His over-anxiety from the morning of the 28th to leave the premises and the so-called attitude of an innocent onlooker, at what occurred, which he assumes, and the feigned silence he maintained or his refusal to make any disclosure to his own friends regarding whatever he saw in the night until a new lodging was secured for him and hot haste with which he caused his own furniture to be removed to safer quarters, and above all the trembling state of mind which he and his wife have displayed in order to escape from the blame of being concerned in the murder of the child and the damaging admissions they thus made, clearly point to the hand of Nathu in the murder of the child, rather than that of Yashodi. The Sessions Judge has not given clear finding as to the part this man had played in the affairs. Nathu's omission to accost the Mahars at the very time when he saw the child crying in the compound and to ask them to take charge of and keep a watch over it until the persons who, in their anxiety to get

the earliest news of the birth of the child with a view to prevent it being killed as soon as it was born, had posted the Mahars to keep a watch on Yashodi, came to the scene, clearly shows that trying to depose in the manner he is now deposing as P. W. 1, he is trying to screen his own complacency in the matter. The various explanations he gave for not informing others immediately are on the face of them clear inventions.

The evidence of the Assistant to the Civil Surgeon (P. W. 6) clearly shows the utter impossibility of a woman in the position of Yashodi being, shortly after the delivery, able to dig the hard soil and make a ditch about 2 feet deep and lift up the Budhalas and stones etc., and keep them on the boy's body and cover the whole thing again with earth so as to prevent detection. The investigating officer (P. W. 7) clearly says that P. W. 1 and P. W. 2 had not told him that they saw Yashodi or Deorao near the child while it was crying. The Sessions Judge has in fact observed that there is nothing to show who dug the pit. He has also disbelieved Nathu's deposition wherein he said that he had seen Deorao and Yashodi going to the place where the child was seen crying. In view of the non-disclosure of this piece of information by him to the investigating officer (P. W. 7), if Nathu was held unreliable in respect to one accused I do not see any reason why he should have been held by the Sessions Judge to be reliable in respect of the appellant: cf. 3 *Lahore Law Journal* page 147, at page 149, where under similar circumstances, the uncorroborated testimony of one witness which was disbelieved as to one accused by the Sessions Judge was discarded by the High Court also as to the other accused whom he implicated.

The Sessions Judge has himself disbelieved the prosecution evidence tendered to show that Yashodi pointed out the burial place to the Panchas or to the Police Sub-Inspector. Then again the Sessions Judge does not seem to attach any importance to the unsigned statement (Exhibit P-1) of Yashodi recorded by the Patwari. The evidence of the Patwari and of Rambhao discloses circumstances which clearly detract from the value to be attached to it. I ignore it as inadmissible under S. 25 of the

Evidence Act, inasmuch as in the admitted exhortation to speak the truth there is inducement that the deponent will escape the penalties of law and it was made virtually in the presence of Balkrishna (P. W. 10).

I therefore hold that the prosecution has failed to make out that the child was murdered and buried by Yashodi.

I am not consequently prepared to uphold the conviction of Yashodi on the evidence of partisan witnesses like Nathu (P. W. 1) his wife Radhi (P. W. 2), Rambhao (P. W. 5), Laxman Patwari (P. W. 8) and Balkrishna (P. W. 10) who appear to have made common cause against Yashodi. The appeal is allowed and the appellant is ordered to be set at liberty.

Appeal allowed.

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HALLIFAX, A. J. C.

Gauri Bai and others—Plaintiffs—Appellants.

v.

Gaya Bai—Defendant—Respondent.

Second Appeal No. 490 of 1925, Decided on 3rd September 1926, from a decree of the Addl. Dist. J., Raipur, D/- 29th July 1925, in Civil Appeal No. 120 of 1925.

* (a) *Hindu Law—Widow—Surrender need not be by a written and registered instrument—Registration Act, S. 17—Transfer of Property Act.*

There is nothing in the Registration Act which requires any particular transaction to be recorded in writing; that Act requires only that when certain transactions are so recorded the writing shall be registered. Nor is there anything in the Transfer of Property Act or in any other law, requiring that a mere extinguishment of an interest in immovable property shall be in writing. A surrender by Hindu widow of her interest is not a transfer of any kind, but is merely an abandonment of an interest, which the next reversioner takes in his own right and not because anything is conveyed to him by the widow. Such an abandonment can be effected without a written instrument though if one is executed it would undoubtedly require registration, under S. 17 of the Registration Act: 42 I.C. 939, *Appr.* [P 45, C 2; P 46, C 1]

(b) *Hindu Law—Widow—Surrender.*

An agreement by widow to surrender her interest in return for a place of residence and an allowance of certain amount per month for a

maintenance is effective as a valid surrender : 42 *Mad*, 523 (P. C.) and 48 *Cal*. 100 (P.C.), *Rel. on*. [P 46 C 1]

J. C. Ghose—for Appellants.

B. K. Rose and *P. N. Rudra*—for Respondent.

Judgment.—This judgment in this appeal by the plaintiffs Gauri Bai and others, will govern also the appeal by the defendant, Gaya Bai, against the same decree (S. A. No. 494 of 1925). The appeal of the plaintiffs is only against the decision that their claim to recover the occupancy holding is barred by time. It was pleaded by the defendant that Ram Asra sold this holding to Motilal in March 1921, with the consent of the landlord, and if that is true the claim is not only barred by time but untenable otherwise. There is no finding on this plea in the lower appellate Court, the learned Judge preferring to hold that the claim is otherwise time-barred, even if the plea is untrue. It is perhaps open to doubt whether time would begin to run against the reversioners before the second marriage of Bati Bai, if Motilal took possession after the death of Ram Asra, and it is advisable to examine the evidence on the plea of sale by Ram Asra, in order to make sure that the question of law does arise before discussing it.

Ram Asra died on the 26th of June 1921, and his widow Bati Bai married again in May 1922. The defendant, Gaya Bai, stated in her pleadings that in March 1921, Ram Asra transferred the occupancy holding in question to Motilal in lieu of Rs. 300 due to him. It is beyond doubt that during the agricultural year 1921-22 Motilal was in possession of the holding and paid no rent for it to Ram Asra's widow, whether he was in possession for her or for himself. Deodhar Singh Kurmi (D. W. No. 1) is the brother and mukhtiyar of the lambardar of the patti in which the holding lies. He says he witnessed the alleged sale by Ram Asra, and took the rent for the year 1921-22 and the following year from Motilal and that for 1923-24 from his widow Gaya Bai, passing receipts to them as the tenants of the land.

Evidence of the sale having taken place in their presence, which on the face of it is perfectly credible, is given also by Budhram Kalar (D. W. No. 2) a tenant of the same village, and Dani Kurmi (D. W. No. 9), a tenant of a neigh-

bouring village and Ram Asra's father-in-law, and there is nothing at all on the other side to rebut it. The finding seems inevitable that Ram Asra did sell the holding to Motilal in March 1921, with the consent of the landlord, and the plaintiffs' appeal must fail.

In the appeal by the defendant Gaya Bai we are first concerned with the matter of a surrender of the estate by Gauri Bai, after she had inherited a life-interest in it from her son Ram Asra, so that it passed to Motilal who was then the next reversioner. This is ordinarily, but not quite correctly, called a surrender "to" the next reversioner, though it might be said to be in his favour. The life-owner merely puts an end to her own interest, and the estate lies there to be taken by whosoever chooses and has a right to do so. The matter is not without importance as will be seen later. It was found in the first Court that Gauri Bai did orally make such a surrender of her interest in the estate in favour of Motilal, but the learned Subordinate Judge was of opinion that she retained so much of it as to make it invalid, as it was not an abandonment of her entire interest. In appeal the making of the surrender was apparently accepted as a fact, and the Court also accepted

the proposition that if the surrender were otherwise valid the retention of small property like two houses and utensils would not make it invalid."

The learned Additional District Judge was, however, of opinion that such a surrender could only be effected by a registered instrument in writing, for the reason that

the estate is admittedly worth more than Rs. 100 and the surrender meant an acceleration of the estate but at the same time it operated to extinguish the widow's life-interest in the property and as such it could not be valid unless it was effected by a registered instrument.

There is nothing in the Registration Act, of which the learned Judge was apparently thinking, which requires any particular transaction to be recorded in writing; that Act requires only that when certain transactions are so recorded the writing shall be registered. Nor is there anything in the Transfer of Property Act, or, as far as I am aware in any other law, requiring that a mere extinguishment of an interest in immovable property shall be in writing. The surrender with which we are concerned

as has been said already, was not a transfer of any kind, it was merely an abandonment of an interest, which the next reversioner took in his own right and not because anything was conveyed to him by the widow. Such an abandonment can be effected without a written instrument, though if one is executed it would undoubtedly require registration, under S. 17 of the Registration Act. With the reasons stated for accepting this view by the Madras High Court in *Satyalakshmi Narayana v. Jagannadham* (1) I am in respectful agreement.

This proposition was accepted by the learned advocate for the plaintiffs, but he fell back on the contentions that the alleged oral surrender of her life estate by Gauri Bai has not been proved, and that anyhow it would be inoperative because it was not a surrender of the whole of her interest. On the question of fact, on which no finding was given in the lower appellate Court the evidence is as follows. (The judgment here dealt with the evidence and held that Gauri Bai did make the alleged oral relinquishment of her interest in the estate she inherited from her son Ram Asra and proceeded.) There remains the question of the completeness of the abandonment of her interest in the estate by Gauri Bai. She was allowed to retain what is called two houses, but was apparently only one residence consisting of two buildings in one enclosure, and Motilal promised to give her annually 24 khandis of dhan, one of unhari and Rs. 25 in cash, roughly Rs. 300, for her maintenance. She was also, of course, allowed to keep a few pots and pans. The law in respect of such a surrender is set out by the Privy Council in *Rangasami Gounden v. Nachiappa Gounden* (2), where their Lordships said that it "must be a bona fide surrender, not a device to divide the estate with the reversioners." In the later case of *Sureshwar Misser v. Maheshrani Misrain* (3) the widow surrendered the estate on condition of being "granted" (whether for her life or absolutely does not appear) a hundred bighas of land by the reversioner who took the estate. That was held not to

be a device to divide the estate with him, but only a reasonable provision for her own maintenance.

It is to be noticed that in the present case the only part of the estate retained by the widow is the residence in the village, even if she has become the owner of that residence and is not merely allowed to live in it. A place of residence in a village such as Anda would certainly not be so much of the estate as would make the relinquishment of the rest anything less than complete, in the sense in which that term must be used here. It is, of course, true that an agreement to give the widow an allowance for her maintenance might be really nothing but "a device to divide the estate." But it could not be regarded in that light unless it was unreasonably large and it has never been suggested that Gauri Bai could maintain herself even in reasonable comfort with less than Rs. 25 a month and a rent-free residence.

I hold, therefore, that the oral surrender of her life-estate by Gauri Bai was complete and valid, and Motilal became the owner of the estate when she made it. In this view of the case it is not necessary to discuss the matter of the refunding to the defendant of the Rs. 635-3-5 (not Rs. 517 as stated in both lower Courts) paid by Motilal in satisfaction of debts recoverable from the estate after Gauri Bai had put him in possession of it, though it is hard to see how the plaintiffs could be entitled to take the estate without making that payment. The decree of the lower appellate Court will be set aside and in its place a decree will be issued dismissing the suit. The plaintiffs must pay the whole of the costs of both parties in all three Courts. A consolidated pleader's fee of two hundred rupees will be allowed for the two appeals to this Court.

Appeal allowed.

(1) [1917] 34 M. L. J. 229=6 L. W. 765=42 I. C. 939=(1917) M. W. N. 854.

(2) [1919] 42 Mad. 523=50 I. C. 498=46 I. A. 72 (P. C.).

(3) [1920] 48 Cal. 100=57 I. C. 325=47 I. A. 233 (P. C.).

* A. I. R. 1927 Nagpur 47

KINKHEDE, A. J. C.

Sheodin—Accused—Applicant.

v.

Mt. Jumni—Non-Applicant.

Criminal Revision No. 168 of 1926, Decided on 13th May 1926, from the judgment of the Dist. Mag., Mandla, D/- 16th February 1926, in Criminal Appeal No. 6 of 1926.

* *Penal Code, S. 355—Prosecution must prove absence of grave and sudden provocation—Disturbing an orthodox Hindu Brahmin in his prayer is sufficient to cause grave and sudden provocation.*

In order to prove that the assault by the accused was made with intent to dishonour a woman, absence of grave and sudden provocation has to be proved.

The accused, an orthodox Hindu Brahmin, took his bath and was sitting on a stone in the midst of a stream offering his prayers. While he was so reciting his prayer, a low caste woman passed through the stream at such close distance from that place that the surface of the water got naturally disturbed and some particles of water fell on his body. The accused was upset and after some exchange of abuses the accused caught hold of the woman's hand.

Held: that the accused acted under grave and sudden provocation and was not guilty under S. 355. [P. 47, C. 1, P. 48, C. 1]

A. V. Khare and W. B. Pendharkar—
for Applicant.

Vithalrao Kale—for Non-Applicant.

Order.—The applicant who is an orthodox Hindu belonging to the regenerate class of Brahmins had taken his usual bath and was sitting on a stone in the midst of a stream offering his prayers. While he was performing his sandhya wandan and meditating on the object of his worship and reciting some prayer, the non-applicant, a low caste woman, passed through the stream at such close distance from that place that the surface of the water got naturally disturbed and some particles of water fell on his body. The contact of such water particles causes pollution and necessitates the taking of a fresh bath before the prayer can be completed. This necessarily causes a break in the continuity of the prayer which is a very essential element in all prayers as the belief prevails that the merit earned by the prayers offered is lost if there is a break in them. Such interference or break in one's prayer ought to upset not merely a hasty or hot-tempered person, but even any person of ordinary sense

and calmness; and I dare say every person with a religious turn of mind would naturally resent it. There was besides an exchange of abuse and this provoked the accused a great deal. The trying Magistrates have after rejecting whatever exaggeration there was in the story told by the complainant, definitely found that the accused acted under provocation when he caught hold of the complainant's hand.

The District Magistrate being of a different religion could not be expected to know much about the feelings and religious susceptibilities of an orthodox Hindu Brahmin, and he naturally failed to properly appreciate the force of the finding of the trying Magistrates that the accused acted under provocation. As he has in a somewhat sketchy judgment confirmed the findings of the trying Magistrates, I take it that he also held the provocation proved.

In the circumstances of the case, the provocation must necessarily have been grave and sudden when we take into consideration the condition of mind in which the offender was at the time the same was caused to him. I am entitled to presume that the condition of the mind of the accused must necessarily have then been such as gave him adequate cause to act in the manner he did, with due regard to decency and to the fact that the person who offended and disturbed him in his religious pursuits, was after all a woman. According to the findings he simply caught hold of her hand. He must have then felt the necessity of curbing at once the insolent behaviour and the abusive retort which she gave him and he must have felt himself sufficiently justified in thinking that the best way to curb or check her was to catch hold of her hand to attain that object and to make her feel that he could not be so trifled with by her. If the person insulting him had been a male, I fancy he might have even beaten him or given him a sound thrashing. I am not, therefore, prepared to hold that, circumstances as he then was, he could have intended to dishonour her by catching hold of her hand. Such an intention could not be imputed to him or inferred from the facts held proved in the case. In order to bring the case under S. 355, I. P. C. it was for the prosecution to establish that the accused did not receive grave and

sudden provocation from the person assaulted. In short, in order to prove that the assault by the accused was made with intent to dishonour Mt. Jumni, absence of grave and sudden provocation had to be proved. On the findings arrived at such provocation is proved to exist in this particular instance of assault. The District Magistrate ought to have seen that the conviction and the sentence could not therefore be sustained on the state of the record.

I therefore set aside the conviction and order the fine, if any, realized to be refunded to the applicant.

Conviction set aside.

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HALLIFAX, A. J. C.

Maharaj Singh Gond — Accused—Applicant.

v.

Emperor—Non-applicant.

Misc. Petition No. 34 of 1926, Decided on 28th June 1926, for transfer of Criminal Appeal pending before the Dist. Mag., Bilaspur.

(a) *Criminal trial—Appeals — Joint trial — Criminal P. C., S. 419.*

Appeals by different persons convicted by one judgment in a joint trial may be heard together, but they must be made separately. [P 48 C 1]

(b) *Criminal P. C., S. 526—Transfer of appeal jointly filed—Separate application is not necessary.*

A separate application for transfer of an appeal jointly filed by two or more accused is not absolutely necessary, though a joint appeal had been filed. [P 48 C 2]

(c) *Criminal P. C., S. 526—Essentials.*

In an application for transfer what has to be established is a belief in the mind of the accused person that his case will not be fairly tried. [P 48 C 2]

G. S. Brahmarakshasa—for Applicant.

Order.—The applicant, Maharaj Singh Gond, and five other persons were convicted of rioting by a Magistrate of the Second Class and each of them was sentenced to rigorous imprisonment for six months. On Maharaj Singh a fine of Rs. 50 was imposed in addition. They all appealed to the District Magistrate in one petition, which is obviously wrong; appeals by different persons may be heard together but they must obviously be made separately. When the joint appeal came up for hearing on the 18th

May it was adjourned to the 21st of the same month at the request of the pleader for the appellants. The grounds of the request are not stated.

On the 21st the pleader informed the Court that he proposed to apply to this Court for a transfer of the case to some other Court and asked for an adjournment for fourteen days, a period which he himself specified. An adjournment was accordingly granted up to the 4th of June. On that day a further adjournment was requested on the allegation that an application for transfer had been filed but no orders had yet been received on it. That is hardly surprising as the application was not made till the 3rd of June. (It may be mentioned that a separate application for transfer was made by each accused person, which is not absolutely necessary, though a joint appeal had been filed.) A further adjournment was properly refused. The appeal was heard on the 4th of June and dismissed on the 7th. Under these circumstances the applications for transfer have, of course, been withdrawn.

The fact and dates stated above show very clearly that they were not made in good faith but merely for the purpose of delaying matters, though what advantage there was to be got out of that is as obscure in this case as in most others in which the same tactics are employed. The reason stated in the applications for a transfer also leads to the same conclusion from its inadequacy. What has to be established is a belief in the mind of the accused person that his case will not be fairly tried; that it will be so tried can fortunately be assumed except in a very few cases, and it certainly can here. Now it is practically certain that not one of the accused knew anything about the remark entered in the Visitors Book of the Veterinary Dispensary by the District Magistrate as Deputy Commissioner on which his apprehension of injustice is said to be based. But anyhow all that appears in it is that the Veterinary Assistant had "recently been the victim of a most unfortunate affair" in the appellants' village which is admitted by everybody to be true, and that the Patwari who is not one of the accused, was probably at the bottom of it. The application for a transfer is rejected.

Application rejected.

A. I. R. 1927 Nagpur 49

HALLIFAX, A. J. C.

Emperor—Applicant.

v.

Akosh Kunbi—Accused--Non-Applicant.

Criminal Revision No. 286 of 1926,
Decided on 19th August 1926, reported
by the Dist. Mag., Betul.

(a) *Criminal Trial—Sentence does not depend on the section of Penal Code.*

The extent of the proper sentence does not depend entirely or even mainly on the section under which the sentence has to be passed. That has to be decided on the circumstances of the offence. [P. 50, C. 1]

(b) *Penal Code, Ss. 323 and 325—Sentence under S. 323 may be heavier.*

It is by no means uncommon for an offence punishable under S. 323 to require, and get, a much heavier sentence than one punishable under S. 325. [P. 50, C. 1]

(c) *Criminal P. C., S. 562—Penal Code, S. 325—There is no middle course between imprisonment and order under S. 562.*

On a conviction under S. 325, or any other section that says imprisonment may be awarded with a fine in addition, there is no middle course between a real sentence of imprisonment (with or without a fine) and an order under S. 562. [P. 50, C. 1]

Order.—Akosh Kunbi has appeared in this Court and pleaded, as he was entitled to do, that the offence of which he has been found guilty was not proved and he ought to have been acquitted and should be acquitted now. I have therefore examined the whole record and find the following facts clearly proved. Akosh had a dispute with Barkia Kunbi over land, in which the latter was victorious and obtained a decree in a civil Court though this was not directly against Akosh. On the night of the 1st of April 1926, about 9 or 10 p. m. Barkia went a short distance outside the abadi to ease himself and while he was squatting on the ground Akosh ran at him with a stick in the darkness and belaboured him with it. He struck him twice on the head, causing two contused scalp-wounds on the left parietal bone, but, luckily for both of them, no fracture of the skull. He struck him a third time on the head, causing a bruise two inches long on the left temple, though Barkia himself is recorded as describing this as a blow on the chin. He then struck him across the left shoulder on the back of his left wrist and more than once on the inner part of his thighs

aiming apparently at his testicles. The injury to the left wrist was almost certainly a fracture of a bone, which remained undetected on account of the swelling. Finally Akosh sat on Barkia and set about strangling him, but he fled on the arrival of others who had heard Barkia's shouts.

Barkia had to be carried home. On the 3rd of April he was taken to the Dispensary at Multai where he remained till the 25th, that is for twenty-two days, quite unable to follow his ordinary pursuits. In both the Courts below the period during which he was so disabled has been taken to be twenty two days. That leaves out of account the two days before he was taken to the Dispensary, and also the injury to the wrist. That, as has been said, was almost certainly a fracture of a bone, probably the radius near its lower end, but anyhow on the 7th of May, thirty seven days after the assault, Barkia was recorded as saying, with obvious truth :

All my wounds except the one at the left wrist are now healed. I am as yet unable to discharge any of my duties. I am a cultivator. I cannot plough my fields. I am also unable to perform winnowing operations at my khalyan.

The Magistrate of the Second Class who tried the case was of opinion that the sentence that should be passed under S. 325 of the Indian Penal Code was one of rigorous imprisonment for three months, and further that the accused ought to be bound over to keep the peace after his release. The taking of a bond was clearly proved necessary not only by the circumstances of the offence but also by the conduct of the accused in Court, for which he was fined Rs. 30 under S. 380 of the Indian Penal Code. The Sub-divisional Magistrate, to whom the case was referred, was of opinion that between this offence and one punishable under S. 323 of the Indian Penal Code there was only the technical difference that

the complainant was in the dispensary for 21 days and was unable to follow his ordinary pursuits.

Not only was he there for 22 days but he had been disabled for two days before he went there and remained so for at least twelve days after he left, and probably many more. On that mistaken view of the facts the Sub-divisional Magistrate ordered Akosh to execute a

bond in Rs. 200 with one surety under S. 562 of the Criminal P. C.

The extent of the proper sentence does not depend entirely or even mainly on the section under which the sentence has to be passed. It is by no means uncommon for an offence punishable under S. 323 to require, and get, a much heavier sentence than one punishable under S. 325. That has to be decided on the circumstances of the offence, to which the learned Magistrate seems to have given the most perfunctory consideration. The proper punishment for this offence would be no greater if Barkia had been disabled for twenty-one days than if he had been disabled for nineteen only, nor would it be any less in the latter case.

The further reasons given by the learned Magistrate in support of his order, on a reference by the District Magistrate, I am quite unable to follow. They include the incorrect statement that the accused, Akosh Kunbi, is a Gond, and seem to be based on the idea, shared by the District Magistrate, that a legal sentence under S. 325 of the Indian Penal Code is one of imprisonment for one day and a substantial fine. That is a mere evasion of the law, and the only possible justification for the order passed under S. 562 of the Criminal P. C. would be an appreciation of the impossibility of a Court evading the law in that way, together with the finding that the facts of the case made it undesirable to send the offender to prison at all. On a conviction under S. 325, or any other section that says imprisonment may be awarded with a fine in addition, there is no middle course between a real sentence of imprisonment (with or without a fine) and an order under S. 562 of the Criminal P. C.

In the present case it is perfectly clear that the circumstances would call for a sentence of imprisonment, even if the hurt caused had not fallen within the definition given in S. 320 of the Indian Penal Code. Akosh waylaid Barkia and beat him savagely, because he had failed in his attempt to rob Barkia of land that belonged to him, and it is due to no restraint in the beating that Akosh was not guilty of murder; indeed the circumstances would easily have justified a conviction under S. 307 of the Indian Penal Code.

The least sentence which seems to me to fit all the circumstances is one of ri-

gorous imprisonment for six months and a fine of a fifty rupees, with further rigorous imprisonment for three months in default of the payment of the fine. That sentence is accordingly passed on Akosh Kunbi under S. 562 (3) of the Criminal P. C. It is further ordered that the amount of the fine, if it is recovered, shall be paid to Barkia Kunbi as compensation for the injury done to him.

Sentence passed.

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MITCHELL, O. A. J. C.

Ganesh and others—Plaintiffs—Appellants.

v

G. S. Khaparde—Defendant—Respondent.

Second Appeal No. 390-B of 1924, Decided on 24th July 1926, from the decree of the Dist. J., Amraoti, D/- 17th September 1924, in Appeal No. 80 of 1924.

(a) *Transfer of Property Act, S. 111 (g)—Principle of forfeiture applies to Berar.*

Though S. 111 (g) of the Transfer of Property Act does not apply to agricultural leases in Berar, yet the principle of forfeiture therein enunciated applies as a principle which should guide the Courts in dealing with such matters.

[P 51, C. 2]

(b) *Transfer of Property Act, S. 111 (g)—Denial, to cause forfeiture must be unequivocal—Overstatement of claim by tenant is not denial where titles are doubtful.*

The repudiation of a landlord's title by the tenant would in certain circumstances work as a forfeiture. The denial which operates as a forfeiture must be by matter of record before institution of any suit for forfeiture, and must be in clear and unmistakable terms. A mere overstatement of his case by tenant does not amount to denial where the titles were really in doubt.

[P. 51, C. 2, P. 52, C. 1]

(c) *Transfer of Property Act, S. 107—Land titles in Berar considered.*

Land titles in Berar cannot always be compared to leases under the Transfer of Property Act; the incidents are frequently remnants of old feudal tenures in which distinction between lessor and lessee contained in the Transfer of Property Act loses its clearness of outline.

[P 52 C 1]

H. S. Gour, R. R. Jaywant and Y. G. Deshpande—for Appellants.

G. V. Deshmukh and V. Bose—for Respondent.

Judgment.—This case arises from a protracted litigation which began in 1915 with Civil Suit No. 46 of 1915 in the Court of the Subordinate Judge, Ellichpur. The predecessors of the present plaintiffs

sued the present defendant for possession and mesne profits of a certain field. They alleged that the defendant's father had got a portion of the field about 1882 on a 20 years lease, that thereafter he had been given a lease for a year of the whole field, and then had been holding the field over on the same rent. The defendant denied specifically and emphatically that he was a tenant of the plaintiffs, and claimed that the field had been given to him in perpetuity on payment of the land revenue only, in consideration of legal advice and other services rendered. The Subordinate Judge held that the defendant was not the owner but the permanent lessee of the field and gave a decree for ejectment on the ground that during the trial of the suit the defendant had denied the plaintiff's title as owners. He granted also a decree for arrears of rent. The judgment of this Court is Ex. P-4 in the present record.

The defendant appealed to the District Judge who delivered judgment on 18-10-18 (copy filed as Ex. P-6). He held that the denial of title had not been made prior to the suit and could not therefore be a basis of a claim for eviction on the ground of forfeiture. He held further that what had been transferred was a right to cultivate the land in perpetuity, conditionally on the payment of whatever assessment Government might charge. He accordingly reversed the whole decree of the lower Court and dismissed the suit with costs. The plaintiffs then appealed to this Court and the judgment of Kotval, A. J. C., appears as Ex. P-13. The learned A. J. C. makes no definite finding as regards the rent payable by the defendant to the plaintiffs, but he makes a specific finding "that the defendant was created a permanent lessee." He also restored the lower Court's decree for rent. It will be seen that the question of forfeiture based on the defendant's denial of the plaintiff's title during the course of the trial was definitely raised, but was disallowed on the ground that the denial had not been made before the institution of the suit, and did not, therefore, furnish a cause of action which could be included in that suit.

The judgment of this Court in the previous litigation is dated 29-4-22. The plaintiffs renewed the attack on the 27th

March 1923, and sued again in the Court of the Subordinate Judge, Ellichpur, to evict the defendant on the ground that his denial of their title during the currency of the previous trial operated as a forfeiture on which they could now sue. The learned Subordinate Judge held that the denial in the previous suit operated as a forfeiture, and granted the plaintiffs a decree for possession with arrears of rent. The defendant thereupon appealed to the District Judge, who held that the denial in the previous suit should not be construed as amounting to a forfeiture, and he dismissed the plaintiffs' suit, in so far as it related to the claim for possession. The plaintiffs now appeal to this Court and claim that the denial in the previous suit was clear and unambiguous and did operate as a forfeiture and that the Judge of the lower appellate Court has drawn a wrong inference from the facts which he himself held to be proved.

As regards these facts there can be no possible doubt. A copy of the written statement in the previous suit has been filed as Ex. P-3, and it most emphatically asserts that the defendant had been claiming the rights of an owner for many years past and still claims them. The learned Judge of the lower appellate Court has discussed this point in paragraph 7 of his judgment and I concur with him when he says:

I can conceive of no more definite unambiguous unequivocal declaration of ownership and denial of plaintiffs' title to the land.

On this finding it is my duty to apply the law of British India relating to forfeitures of agricultural tenancies, to which the Transfer of Property Act does not apply. At the outset I accept the contention of the learned counsel for the appellants that though S. 111 (g) of the Transfer of Property Act does not apply to agricultural leases in Berar, yet the principle of forfeiture therein enunciated applies as a principle which should guide the Courts in dealing with such matters. I need not refer to all the authorities cited before me to this effect but will only refer to the latest one which applies with special relevance: *Vidyavardhak Sangh Company v. Ayyapa* (1). In this judgment it is held:

that the repudiation of a landlord's title by the tenant would in certain circumstances work as a forfeiture. This is not the ancient Indian

(1) A. I. R. 1925 Bom. 524=49 Bom. 842.

law, but has been adopted by the Courts from the law of England and is now embodied in the Transfer of Property Act, 1882....The denial which operates a forfeiture must now be by matter of record before institution of any suit for forfeiture, and must be in clear and unmistakable terms.

This principle of law, not being a statutory rule, must, however, be applied by the Courts with due consideration for the equities of the case. It would not be sound to extract the rule as it stands from S. 111 (g) of the Transfer of Property Act, and to apply it to agricultural tenancies in Berar as if these tenancies were leases under the Transfer of Property Act. Leases under that Act are governed by S. 107, which would have required the lease in the present case to have been by a registered instrument. It was in fact an oral lease and Kotval, A. J. C., in delivering the judgment in second appeal in the previous suit still finds difficulty in giving a clear account of its origin. Again, land titles in Berar cannot always be compared to leases under the Transfer of Property Act; the incidents are frequently remnants of old feudal tenures in which distinction between lessor and lessee contained in the Transfer of Property Act loses its clearness of outline. We find inferior holders who cannot be distinguished from tenants, tenants who cannot be distinguished from inferior holders, superior proprietors who own nothing but a mere right to a share in the land revenue, and inferior holders or tenants who own everything else. In order to come to a fair decision in the present case it is necessary to examine in some detail the pleadings and the findings in the first suit and so to ascertain and examine the circumstances of this case.

In that suit the plaintiffs claimed that the defendant was a mere annual tenant and they sought to eject him as such. To meet this the defendant claimed that he was an owner of the field, whose only burden was the payment of the Government land revenue through the plaintiffs. The final decision of this Court was that the defendant was a permanent lessee, but the judgment (Exhibit P-13) throughout used such phrases as "intention seems to have been," "but apparently there was," "it was apparently in view of this," "the plaintiffs appears to have treated," "I am more inclined to agree with the trial Court than the lower appellate

Court," and so on. The facts emerge very dimly that when this land was first given to the defendant, there was some hope that it might be declared muafi land, but that there would be no such hope if it were definitely transferred in full title to some third party. Accordingly the plaintiffs' predecessors gave the land in perpetuity to the defendant, subject only to the payment to them of the land revenue assessed by Government. This Court has already held that this transaction was a permanent lease and that finding is final. I do not wish to challenge it in any way, but I must point out that if it had been held that the defendant was the owner of the field and not the permanent lessee, then the practical difference would have been very little. In either case the defendant would have held subject to the payment of land revenue, and the plaintiffs would have derived no pecuniary benefit whatsoever. The only possible difference would have occurred if the defendant had failed to make these annual payments; for, presumably, if he was a permanent lessee, the plaintiffs would have been entitled to re-entry; whereas, if the defendant was owner, then the plaintiffs would have had no claim to re-enter. In view, however, of the fact that the annual payment is very small this difference between the two titles amounts to very little.

On the other hand the plaintiffs asserted that the defendant was only an annual tenant, subject to eviction on due notice given under S. 79 (2) of the Land Revenue Code, and subject also to a heavy enhancement of rent at any time. The decision of this Court awarded to the defendant a title which in practice deviated very slightly from the title set up by him, but which deviated very widely from the title which the plaintiffs asserted he held. It seems inequitable that where the plaintiffs had failed in their claim to diminish the defendant's title to that of a mere annual tenant, they should now be allowed to evict him entirely on the ground that he had overstated his claim to a degree which does not compare to the degree of overstatement by the plaintiffs themselves.

Again as I have pointed out from the judgment of Kotval, A. J. C., the real relationship between the parties was doubtful. The difference between a lease

in perpetuity subject only to the payment of land revenue and ownership with a similar burden is very small. The original grant was made about 1882, and was an oral grant. The defendant had held the field for over a quarter of a century subject to the payment of land revenue only. It was not a dishonest plea by him when he set up his title as owner from these facts. Indeed it may fairly be asserted that the relationship of landlord and tenant between the two parties was not definitely established until Kotval, A. J. C., delivered his judgment on the 29th April 1922.

On these grounds I consider it inequitable to apply the doctrine of forfeiture by denial of title to this case. I would have had no hesitation in doing so, if there had been a similar equitable principle applying in favour of the defendant and against the plaintiffs, based on the plaintiffs' denial of the defendant's clear title to be regarded at least as a permanent lessee. In the present case the application of this principle would lay severe emphasis on the defendant's failure to establish one small element in his claim, and would ignore entirely the plaintiffs' failure to establish a very large element in their claim. I consider it fair to terminate this long litigation by leaving matters where they stood on the date of the judgment of Kotval, A. J. C., that is, with a declaration that the defendant is a permanent lessee of the land in suit. I, therefore, dismiss the appeal with costs.

Appeal dismissed.

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KINKHEDE, A. J. C.

Tularam and others—Applicants.

v.

King-Emperor—Non-Applicant.

Mis. Petition No. 43 of 1926, Decided on 7th July 1926, from the order of the 1st Cl. Mag., Bhandara, D/- 17th June 1926.

* (a) *Criminal P. C., S. 497—“Death or transportation for life” does not extend to offences punishable only with transportation for life.*

The phrase “death or transportation for life” in S. 497 does not extend to offences punishable with transportation for life only; and means only those offences for which death and trans-

portation for life are alternative sentences : *A. I. R. 1926 Rang. 51, Foll.* [P. 55, C. 1]

(b) *Criminal P. C., S. 497—Principles guiding Magistrates in granting bail indicated.*

The object of the detention of the accused being to secure his appearance to abide the sentence of law, the principal enquiry is, whether a recognizance would effect that end. In seeking an answer to this enquiry Courts have to consider the seriousness of the charge, the nature of the evidence, the severity of the punishment prescribed for the offence, and in some instances the character, means and standing of the accused. The intention of the Legislature is that an accused person should be brought before a Magistrate competent to try him with as little delay as possible, and that occasions for remand to jail custody of under-trial prisoners should be as few as possible. [P. 55, C. 1]

*B. K. Bose, V. Bose and M. R. Bobde—*for Applicants.

Order.—The applicants (1) Tularam, (2) Ganpati, (3) Dasroo Krishnoo and (4) Dasroo Sambhoo have moved this Court for being released on bail, their application to that effect to the trying Magistrate or the District Magistrate not having been wholly successful. The applicant Tularam is one of the five trustees appointed under a will of one Vithoba which is alleged to be forged. The applicant Ganpati is the scribe and the two Dasroos the attesting witnesses. The complaint was filed on 22-2-26 by one Bhagwandass, S. I., for prosecuting all these applicants for forgery under S. 467, Indian Penal Code, before Mr. B. A. Smellie, who, after examination of the complainant, ordered warrants of arrest to issue against the four accused for 9-4-26, the date fixed for hearing. On 31-2-1926 the applicant Tularam appeared with his pleader Mr. Lobo and surrendered himself and applied for bail. Two of the other accused were produced in custody and they were also released on bail. The next day the applicant Ganpati surrendered himself and he was also released on bail. All these were released on interim bail as the date of hearing was still in the future. On 9-4-1926 the question of granting bail was argued and the next day orders were passed under S. 497, Criminal Procedure Code, granting bail for one month to Tularam and rejecting the applications of the other three accused. The grounds for rejecting bail were that the trying Magistrate had no discretion in cases in which sentence of transportation for life can be passed and that reasonable grounds for launching the case existed. So

far as the applicant Tularam was concerned the Court thought that he was entitled to the advantage of the proviso to S. 497 (i) on the ground of sickness. That very day the District Magistrate was moved on behalf of Ganpati and the two Dasroos for bail, but the District Magistrate rejected the applications in the following words :

I have had an occasion to go through this case with the District Superintendent of Police and it appears to me that there are reasonable grounds for believing that the charge should be true. I am therefore unable to grant the bail asked for in this non-bailable case. The applications are rejected.

No progress was made in the case at the hearing fixed for 9-4-26, nor at the adjourned hearing dated 26-4-1926 for the examination of Bhagwandass. As the Magistrate was going out on an extended tour in the interior and apparently thought that the examination may be long, he ordered that his evidence will be taken from day to day as far as practicable and on completion of the evidence the remaining prosecution witnesses will be summoned. In the meantime on the requisition of the District Superintendent of Police the Magistrate ordered on 16-4-1926 that the Will and other documents be sent to the Government Expert. On 26-4-26 nothing could be done for want of the Will and also as the presiding Magistrate had gone to Balaghat for evidence in a criminal case and the case had to be adjourned to 10-5-1926. But as the Will had not been received back from the Government Expert, even on 10-5-1926, and it was not known when it was likely to be received back, the case was adjourned to 7-6-1926. The accused who were in custody were ordered to be produced on 24-5-26, for being remanded for the 7th June 1926 and the bail of Tularam was extended till the date of hearing on production of fresh medical certificate. The request for bail of the other three accused was rejected for want of power to grant bail. On 24-5-1926 Ganpati and the two Dasroos were remanded to jail custody till 7-6-1926. On 7-6-1926 Bhagwandass was partly examined and the case was adjourned to the next day. Application of Tularam for bail on the strength of fresh medical certificate was pressed, but it was ordered to pend till the next day. The examination of Bhagwandass was concluded on the 8th June 1926 and the case was adjourned to

17-6-26 for the defence to be ready for cross-examination after inspection of mass of documents put in evidence. Tularam's bail was extended by a fortnight as on account of heat he could not undergo the operation which was contemplated. On 17-6-1926 further examination, cross-examination and re-examination of Bhagwandass took place; as the Public Prosecutor was not available till the 7th July 1926, the case had to be adjourned to 7-7-26 for the examination of two witnesses. The accused who were in jail custody were ordered to be produced on 23-6-1926 for further remand and Tularam was also ordered to surrender himself on that date unless he obtained an order for his bail from this Court in the meantime.

All the applicants on 16-6-26 moved this Court for bail, and a conditional order for bail was passed by this Court on 18-6-26. A rule was issued to the District Magistrate to show cause why the conditional order for bail should not be made final. The District Magistrate in his letter No. Q., dated the 30th June 1926, which was not submitted through the Legal Remembrancer, as required by rule 80 (3) of the Law Department Manual, urged that the order should not be made final for reasons already given by the Magistrate in his order dated 10-4-1926 and also for the additional reason (set forth in his own order dated 10-4-26) that there appeared reasonable grounds for believing that the offence was committed by the accused. The District Magistrate did not think fit to instruct the Government advocate even to appear at the hearing.

It is argued before me by the learned advocate who appears for the applicants that the Magistrate's view that no discretion is vested in him to grant bail in cases in which sentences of transportation for life can be passed is opposed to the principle recognized in *Nagendra Nath Chakravarti, in re* (1) and in *Muhammed Eusoof v. King-Emperor* (2). I agree with the Judges of the Calcutta as well as Rangoon High Court that S. 497, Criminal P. C. leaves ample room for exercise of discretion in the matter of granting bails and the intention of the amendment made by S. 126 of Act 18 of 1923 in that section was to vest

(1) A. I. R. 1924 Cal. 476=51 Cal. 402.

(2) A. I. R. 1926 Rang. 51=3 Rang. 538.

thenceforth in the Courts a discretion less fettered than before. I am also of opinion that the interpretation put by Doyle, J., in *Muhammed Eusoof v. King-Emperor* (2) on the phrase "death or transportation for life" in S. 497, Criminal P. C. is consistent with the widening of this discretion, and is amply supported by the reasons given by that learned Judge. I accordingly hold that the phrase "death or transportation for life" in S. 497 does not extend to offences punishable with transportation for life only; and means only those offences for which death and transportation for life are alternative sentences; and that the Magistrate improperly refused to exercise the discretion vested in him by law of granting bail in the present case. Looking to the extremely tardy manner in which this case is proceeding I think the Magistrate could have been justified in enlarging the accused on bail instead of insisting upon their rotting in jail during the time the Crown is engaged in collecting relevant evidence in support of the prosecution.

As observed in the Calcutta case above referred to at page 416

The object of the detention of the accused being to secure his appearance to abide the sentence of law, the principal enquiry is, whether a recognizance would effect that end. In seeking an answer to this enquiry, Courts have to consider the seriousness of the charge, the nature of the evidence, the severity of the punishment prescribed for the offence, and, in some instances, the character, means and standing of the accused.

The fact that two out of the four accused surrendered themselves before the date of hearing was a circumstance which favoured the view that the accused were not likely to abscond, but that it was a guarantee that they would appear to abide the sentence of law. The intention of the Legislature is that an accused person should be brought before a Magistrate competent to try him with as little delay as possible, and that occasions for remand to jail custody of under-trial prisoners should be as few as possible as S. 344 Criminal P. C. clearly shows. The granting of the District Superintendent's belated request for sending the Will along with other documents to the Government Expert on 16th April 1926 has contributed very largely to the delay that has taken place in the trial of this case. It is really a matter which calls for adverse comment.

The case had to be adjourned twice for that purpose. This must necessarily have caused good deal of inconvenience to the Crown as well as to the accused and their counsel and entailed unnecessary costs to both.

For all these reasons I direct that the rule shall be made final and all the accused shall continue on bail as already directed until the disposal of the case by the Magistrate or until further orders by this Court.

Rule made final.

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HALLIFAX AND MITCHELL, A. J. Cs.

Radhe Kishanlal—Defendant 1—Appellant.

v.

Harkisanlal and others—Plaintiff and Defendants 2 and 3—Respondents.

First Appeal No. 87 of 1925, Decided on 27th August 1926, from the decree of the 1st Cl. Sub-J., Jubbulpore, D/- 1st May 1925, in Civil Suit No. 111 of 1924.

(a) *Hindu law—Partition between father and son—Son's son, if minor, need not be given separate share.*

On partition between father and son, the son's son should not be given a separate share if he is a minor and living with his father. [P 56, C 1]

* (b) *Hindu Law—Partition between father and son—Wife gets a share equal to that of son.*

In the Central Provinces, when a father makes or enforces a partition of the ancestral family property with his sons, a share equal to that of a son must be allotted to the father's wife, subject to diminution on account of any stridhan she may have received from her husband or father-in-law: 8 Cal. 17; 32 Cal. 234 and 17 Bom. 271, Foll. [P 56, C 2]

M. R. Indurkar—for Appellant.

Hari Singh Gour—for Respondent No. 1.

Mitchell, A. J. C.—The parties to this suit are shown in the genealogical tree below:

Harkisanlal=Krishna Bai

Radhekisanlal

Vishnu Pershad

Harkisanlal sued his son Radhekisanlal for partition of the ancestral family property and joined as defendants his own wife, Krishna Bai, and his grandson, Vishnu Pershad. The claim was for

partition of the ancestral property including moveables. The lower Court passed a preliminary decree in which it declared that Harkisanlal and Krishna Bai were each entitled to a one-third share, and Radhekisanlal and Vishnu to a one-sixth share each, and it directed that only the immovable property of the family should be divided. The son Radhekisanlal now appeals on various grounds which may be considered separately.

The first ground is that the lower Court should not have declared separate one-sixth shares for Radhekisanlal and his son Vishnu, who is a minor living with his father. This contention is obviously correct and has not been resisted in appeal. The decree should be modified so as to make it clear that the Defendant 1, Radhekisanlal, and Defendant 3, Vishnu are entitled between them to a joint one-third share.

The second ground of appeal relating to the guardianship of the minor Vishnu Pershad has been abandoned. The third and fourth grounds of appeal raise the question of the right of Krishna Bai to a share in the family property. The lower Court has allowed her a full one-third share, thereby putting her in the same position with her husband and her son. The son contends that his mother is not entitled to a share of her own but should look for her maintenance to the share allotted to her husband, and that the property should be divided half and half between himself and his father.

The position when sons divide the family property after the death of their father is clear and undisputed—the mother gets a share equal to the share of a son, in order to secure her proper maintenance which would otherwise be jeopardized. But the position when the father himself makes or enforces the partition is not so clear. It has been argued before us that in such partitions the mother should depend on the share allotted to her husband, the father, for her own maintenance; and there is some force in this argument especially in a case like the present where there is only one son, with issue of his own. The effect of giving an equal share to the father's wife in this case will be that the father and his wife will get two-thirds of the ancestral property, while the son, and his wife and family, will get only a

one-third share between them. This does at first glance seem inequitable.

Nevertheless, there is authority for the proposition that when a father makes or enforces a partition his wife is entitled to a share equal to that of a son. This rule is stated very clearly by Yajnavalkya (ii-116) in the following words:

If he (the father) make, the allotments equal, his wives to whom no separate property has been given by the husband or the father-in-law, must be rendered partakers of like portions.

The quotations given on pages 692 and 693 of Gour's Hindu Code show that this rule is re-stated in the Mitakshara, Dayabhaga and Mayukha. So far as the texts go, therefore, the rule is of general application, and will certainly apply to the Central Provinces. It has been acted upon by the High Court of Calcutta in *Sumrun Thakoor v. Chunder Mun Misser* (1) and *Dular Koeri v. Dwarkanath Misser* (2), and by the High Court of Bombay in *Damodardas Maneklal v. Uttamram Maneklal* (3).

It has been mentioned above that the rule appears to work inequitably in the present case, but this inequity is tempered by a consideration of the strong feeling of respect and affection which Hindus show to the mother of the family. However this may be, I consider that the clear texts and the rulings of the High Courts of Calcutta and Bombay should be followed, and that it should be held that in the Central Provinces when a father makes or enforces a partition of the ancestral family property with his sons, a share equal to that of a son must be allotted to the father's wife. The texts cited show that this general proposition is subject to one qualification, namely, that the share of the wife shall be subject to diminution on account of any stridhan she may have received from her husband or father-in-law. In the present case, however, no such diminution has been pleaded and the respondent, Krishna Bai, should get the one-third share allotted to her by the lower Court, without diminution. (The judgment then dealt with the division of the movable property and directing their division recommended that the decree should be modified accordingly; It then proceeded to decide the question of costs.) As regards

(1) [1882] 8 Cal. 17=9 C. L. R. 415.

(2) [1905] 32 Cal. 234=1 C. L. J. 283=9 C. W. N. 270.

(3) [1893] 17 Bom. 271.

costs the appellant has succeeded on points on which he could have succeeded in the lower Court if he had represented his case properly. The questions of the jointness of his one-third share with his son, and the division of the moveable property have not been seriously contested before us, and the appellant has lost his appeal on the important point of the share to be allotted to Krishna Bai. I consider that the appellant should bear all costs in this Court, including pleader's fee at the rate of fifty rupees.

Hallifax A. J. C.—It is made quite clear in the opinion already given by my brother Mitchell that, in a partition made between a Hindu and his sons, his wife gets an equal share with him and each son. That that was the Hindu Law originally is put beyond doubt by the text quoted by my learned brother from Yajnavalkya, and by the Mitakshara (1, 2, 9), the Dayabhaga (III, II, 29) and the Mayukha (IV, 10), and that the rule has not become obsolete is clear from the judgments of the High Courts of Calcutta and Bombay that are mentioned.

For the other reasons stated by my learned brother, I agree that the decree of the lower Court ought to be modified in the manner indicated by him, that is, that the declaration of shares should be that Harkishanlal and his wife Krishna Bai are each entitled to a one-third share in the joint family property and Radhekishanlal and his son Vishnu Prasad are jointly entitled to a one-third share in it, and that the schedule of property for division should show also "all the moveable property belonging to the family and not yet divided." I agree also that the appellant should be ordered to pay all the costs of this appeal, including a pleader's fee of fifty rupees.

The learned Additional District Judge has recorded in his judgment that "the parties do not want any division of moveable property," though from the pleadings, which are certainly very confused, it would appear that they did. What seems to have been the learned Judge's reason for refusing partition of the movable property is stated in the following words in an order passed on a preliminary issue on this point:

In the present case the real object of the suit is not to get partition but to get the debts adjudi-

cated on. Such adjudication cannot bind third parties i. e., the creditors. There is a great difference between making provision for the payment of joint debts out of the family estate when such debts are merely one incident in partition proceedings, and between adjudicating as to the nature of debts and the extent to which they are binding in a suit which is brought in the guise of a partition suit but is really brought to obtain such adjudication.

Under these circumstances it seems necessary to mention that there cannot be a partition of the moveable property without the adjudication which is regarded as impossible. The decision will of course not be binding on anybody but the members of the family; but each of them can sue the other for any money recovered from him by a third person, if that recovery is not in accordance with the decision in this case, which is really an agreement.

Decree modified.

* A. I. R. 1927 Nagpur 57

KINKHEDE, A. J. C.

Mt. Jaibai and another—Defendants 3 and 4—Appellants.

v.

Rewaram and others—Plaintiff and Defendants 1 and 2—Respondents.

First Appeal No. 55 of 1925, Decided on 30th August 1926, from the decree of the 1st Cl. Sub-J., Saugor, D/- 4th February 1925, in Civil Suit No. 63 of 1924.

* (a) *Probate and Administration Act, S. 90—Permission to alienate does not make alienation absolute and unchangeable on the ground of fraud or misrepresentation—Mortgage with Court's permission—All details as to the transaction not disclosed to Court—Court trying the suit on the mortgage can go into the question whether the transaction was reasonable or not.*

He who relies upon a permission necessary under law for the validity of any transaction in his favour must discharge the burden strictly by proving that his case comes within the protection of law and complies with the requirements prescribed by law. [P 60 C 2]

An alienation with permission under S. 90 does not operate as absolute alienation, so as to exclude all enquiries into the question whether the permission was obtained through fraud or misrepresentation, although no doubt such enquiry would not be permissible in the absence of distinct allegations of fraud; 26 Cal. 607; 23 C. W. N. 401, *Rel. on*; 23 C. W. N. 1045, *Dist.*

[P 60 C 1, 2]

The "previous permission" referred to in S. 90 which enables an administrator to mortgage the estate implies that there should be a sanction by

the Court of all the essential elements of the mortgage transaction; it follows that a mere bald sanction to mortgage is not sufficient. Therefore, non-disclosure, while obtaining permission, of full particulars or of material and essential elements of the transaction, or of the conditions to be incorporated in the intended mortgage, as also, of the circumstances leading to the intended transfer, would entitle the Court trying a mortgage suit based on such a mortgage, even though executed with permission, to go behind such permission, and give relief not only against the stipulations for payment of interest and compound interest, but also against other stipulations and conditions which may affect the Court generally to take into consideration all such circumstances as may show that the transaction was not overboard but was one which actually operated to put the lender in a position to make the best of the embarrassing situation in which the administrator was placed or that it was unfair or unreasonable in some other way so as to justify interference with its terms: 21 C. L. J. 88, *Rel. on.* [P 61, C 2]

* (b) *Probate and Administration Act, S. 90—Permission of Court obtained by fraud or misrepresentation—Alienation being voidable suit to avoid it is not necessary—Invalidity of the transaction can be pleaded as defence in a suit.*

An alienation with permission of Court obtained by fraud or misrepresentation being voidable only, its avoidance could be even by setting up a defence to a suit to enforce it, and not necessarily by bringing a suit to have it set aside: 16 N. L. R. 3 and 43 *Mad. 760 (F. B.)*, *Rel. on.* [P 60, C 2, P 61, C 1]

B. R. Pendharkar—for Appellants.

S. B. Gokhale and *A. V. Khare*—for Respondents.

Judgment.—The suit out of which this appeal arises was instituted by the respondent Rewaram on the basis of a mortgage executed on 25th February 1921 by the respondents Mt. Punabai and her husband Budhelal in consideration of a sum of Rs. 4,999 said to be advanced by him on the security of a house which belonged to one Karelal, and on his death on 14th November 1917, devolved on his daughters Mt. Punabai, Jaibai, Muliabai and Betibai. Mt. Punabai and Jaibai were granted letters of administration by the District Judge, Sangor, by an order dated 28th April 1919. Mt. Jaibai however took no part in the administration of the estate. While the estate was thus under the administration of Punabai she is said to have borrowed various loans from plaintiff in order to satisfy debts which deceased Karelal had left unpaid and for which his creditors had instituted suits against the heirs and obtained decrees against them. The following are the amounts and dates of the loans advanced by the plaintiff:

Rs.	Amount	Date
Rs. 999		6-6-1919
" 1,000		7-7-19
" 949-5-6		19-9-19
	2,938-5-6	
	60-10-6	Due on account of interest on Rs. 1,999 up to 19-9-19

Rs. 2,999 For this a mortgage, dated 19-9-19, Exhibit P-2, was given by Mt. Punabai in respect of her 8 annas share in the house her husband Budhelal having also joined in the execution.

Rs.	Amount	Date
Rs. 800		10-12-19
" 551-12-3		25-2-21
" 533-3-9		Interest on Rs. 2,999 up to 25-2-21
" 115-0-0		Interest on Rs. 800 up to 25-2-21

Rs. 4,999-0-0

On 14th September 1920 Mt. Punabai, who is Defendant No. 1 in the case applied to the District Judge, as per Exhibit P-5, for permission to mortgage the house in order to raise a loan of Rs. 6,000 to satisfy debts incurred by her for payment of two decrees passed against the assets of deceased Karelal and of other debts due to other creditors who were pressing for payment and for making certain repairs to the house. This application was granted by an ex-parte order dated 18th September 1920 (Exhibit P-6).

The plaintiff made his accounts on the basis of the mortgage Exhibit P-2, and adding the subsequent advances and interest, consolidated all the loans together and took the mortgage dated 25th February 1921 (Exhibit P-1), on which the suit is based. This suit was filed on 28th July 1924 for the recovery of Rs. 7,374-6-3. Besides the executants plaintiff joined Mt. Jaibai as Defendant No. 3 as she was interested in the house mortgaged, to the extent of her half-share therein. It is common ground that Mt. Muliabai transferred her 4 annas share to Mt. Jaibai and Betibai assigned her 4 annas to Mt. Punabai; thus defendant Punabai's share was half and that of Jaibai was half. One Balchand purchased the house covered by the mortgage at an auction sale held by one Girdharilal for recovery of certain amount due to him and consequently he is impleaded as Defendant No. 4. The suit is not contested by Defendants Nos. 1 and 2 who have ad-

mitted the claim in full. The contesting defendants are Mt. Jaibai and Balchand, Defendants Nos. 3 and 4. Their defence which was manifold was overruled in the Court below and the claim as laid was decreed against them. They have therefore come up in appeal to this Court urging several grounds.

The defence so far as it is relevant for the purposes of this appeal may be briefly summarized as under: That the mortgage in suit was not proved to be for consideration advanced on the strength of the permission granted as per Exhibit P-6; that it was not for legal necessity; that the mortgage was not valid and did not affect the estate purported to be mortgaged thereunder particularly because the permission to mortgage was obtained by fraudulent concealment and misrepresentation of relevant facts and behind the back of the appellants; that the interest provided by the mortgage was excessive and could not be decreed in its entirety. The lower Court framing the necessary issues recorded its findings on issues Nos. 3 and 4 (a) which for the sake of reference are reproduced here.

8. Can the Defendants 3 and 4 raise the question of legal necessity in spite of the permission granted by the District Judge? If so, was the mortgage justified by legal necessity? 4 (a) Can Defendants 3 and 4 question the validity of the order granting the permission on the ground that it was obtained by fraud and misrepresentation? (b) If so, was there fraud and misrepresentation as alleged?

The preliminary findings on these issues are dated 2-12-24 and to the following effect:

On Issue No. 3: That unless the Defendants 3 and 4 can be allowed to question the validity of the District Judge's order, which formed the subject of Issue No. 4 (a), the question of legal necessity does not arise.

On Issue No. 4 (a): That the order of the learned District Judge cannot now be questioned on the ground of fraud and misrepresentation. In this view no finding was recorded on Issue No. 4 (b).

As a result of this preliminary decision on Issues Nos. 3 and 4 (a) the scope of the trial was very much restricted and the defendants-appellants were shut out from showing how the mortgage was not binding as against them for the several reasons urged by them. They have reiterated their complaint in this Court in the shape of Grounds Nos. 3 to 10 which embrace the several phases of

the question as to the binding character of the mortgage and the extent thereof.

In my opinion the Subordinate Judge's decision on Issues 3 and 4 (a) is erroneous and had shut out the defence on the points which form the subject of issue No. 4 (b) and also on legal necessity; that point is of vital importance, and enquiry relating to it could not have been shut out for all or any of the reasons assigned by him. The question of legal necessity raised by the defendants not having been allowed to be tried has prejudiced not only the Defendants Nos. 3 and 4, but the plaintiff also, in the matter of adducing proper and adequate proof of the consideration of the mortgage in suit which would establish the fact that the mortgage was for a consideration, advanced to satisfy debts due by the estate, even as against the contesting defendants. The plaintiff has no doubt produced a mass of documentary evidence in the shape of certified copies of proceedings, order-sheets, applications for execution, applications for deposit and their withdrawals, decrees, receipts, written statements, schedules of accounts, judgments, and depositions of witnesses and also some original documents. But the oral evidence tendered by him is so very meagre that it does not go beyond formally proving Exhibits P-1 and P-2. Most of the documentary evidence excepting the certified copies of judgments, decrees and orders were required to be proved by oral evidence in order to connect the giving of the several loans by plaintiff to Mt. Punabai with the alleged satisfaction of the decrees and debts of the deceased Karelal. Formal oral evidence is wanting, and I am inclined to think that it would have been forthcoming had not the lower Court shut out improperly all enquiry on the point of legal necessity and other cognate matters. Plaintiff perhaps thought that in view of the decision there is no necessity for him to go into the witness-box to establish the necessary connexion between the borrowing and the satisfaction of the debts of the deceased.

In my opinion the plaintiff was not relieved of his obligation to show that the loan advanced by him would not have been so advanced but for the permission of the District Judge. If the several advances which are detailed above had been made subsequent to the

date of the permission granted as per Exhibit P-6, there was room for, at any rate, assuming that the plaintiff "bona fide relied upon the order" permitting the mortgage "and made the advances," and that

there is no onus upon him to go and make enquiries about the truth of the allegations upon which the sanction was given.

As a matter of fact except the last item of Rs. 551-12-3 paid in cash before the Sub-Registrar at the time of the registration of Exhibit P-1, the rest of the consideration consists of the sums of (i) Rs. 3,532-3-9 secured by the prior mortgage Exhibit P-2, which was made in contravention of S. 90 of the Probate and Administration Act; and (ii) Rs. 915, on account of cash loan dated 10-12-19; total Rs. 4,447-3-9. In any case this sum of Rs. 4,447-3-9 cannot be said to have been advanced 'bona fide relying upon the order.' But it would not be just for me to disallow that sum without giving the plaintiff an opportunity to show that he could obtain a valid charge for that amount apart from the permission even as against Mt. Jaibai's share by proof of justifying circumstances or by showing that he was himself instrumental in getting the order from the Court of the District Judge by truly placing the necessary material before it.

The cases relied on by the Subordinate Judge in support of his view that an alienation with permission of the District Judge operates an absolute alienation under S. 90 of the Probate and Administration Act irrespective of the existence of the legal necessity, do not appear to me to be cases of the kind we have to deal with here, as the facts and observations in those cases would show. In *Kamikhya Nath Mukerjee v. Hari Churn Sen* (1), enquiry into the fraud and misrepresentation was ordered by the High Court and the case was remanded for the purpose of determining the question whether the fraud alleged in the plaint had been established not only as against the persons transferring but also against the transferee. That case is not an authority for excluding such enquiry: In *Annada Charn Mandal v. Atul Chandra Malik* (2) it was laid down that if the alienee bona fide relied upon the order and made the advance there is no onus

on him to go and make enquiries; and is thus distinguishable. In *Moheshchandra Roy v. Gossai Ganpatgir* (3) the alienations were set aside in spite of the permission of the District Judge because the permission was obtained by fraudulent misrepresentation. Enquiry into the allegations of fraud was held and not shut out. No doubt such enquiry would not be permissible in the absence of distinct allegations of fraud.

The lower Court does not seem to have kept in view the distinction between the position of a person who relying upon the permission subsequently enters into the transaction and on the faith of that permission parts with his money, and that of a person, like the plaintiff who has already staked his money by entering into a transaction in contravention of S. 90 of the Probate and Administration Act, and thereafter tried to secure a recognition with retrospective effect as it were. He who relies upon a permission necessary under law for the validity of any transaction in his favour must discharge the burden strictly by proving that his case comes within the protection of law and complies with the requirements prescribed by law. I need only refer to the analogous case of a mortgagee who while suing to enforce his mortgage has to prove that the essential conditions of a valid execution including attestation were duly complied with. Even if the plaintiff in this case proves that he caused his transferor to secure the necessary permission after a full and true disclosure of all necessary information and that there was no fraud or misrepresentation of any kind in obtaining the necessary permission and that he acted bona fide in taking the mortgage (Exhibit P-1) substantially in lieu of a prior mortgage, and relying on the sanction made a fresh advance of Rs. 551-12-3 to make up the consideration of Rs. 4,999 of the new mortgage, the question still remains how far his case comes within the protection of S. 90 of the Probate and Administration Act which requires a previous permission and not an ex-post-facto permission. It is arguable that much depends upon the peculiar circumstances of each case and the evidence that may be tendered to discharge such a burden.

It is thus clear that the lower Court was wrong in assuming without evidence

(1) [1899] 26 Cal. 607.

(2) [1919] 23 C.W.N. 1045=51 I.C. 197=31 C.L.J. 3.

(3) [1918] 23 C.W.N. 401=51 I.C. 884.

that the plaintiff had earned the protection of law and was exempt from proving the existence of any justifying circumstances as I consider that he is not exempted simply because the mortgage in suit is subsequent in point of time to the order granting the permission. It was incumbent on the plaintiff to show that the borrowing of the money advanced by him was necessary for the discharge of the debts of the deceased and for the proper administration of the estate and that it was an indispensable act of prudent management in the circumstances of the case even if he may not be entitled to the protection which the permission of the District Judge might extend to him. It was equally necessary for the plaintiff to show that the advances which were not originally charged against the plaintiff's 0-8-0 share could be lawfully charged either wholly or partially not only against the defendants' share but also against that of the plaintiff.

It may be desirable to point out that the mortgage Exhibit P-1 was executed after the lapse of over five months from the date of the permission and 20 months from the date of the mortgage (Exhibit P-2); I cannot help remarking that Exhibit P-5 the petition for obtaining permission does not disclose the existence of the prior mortgage (Exhibit P-2) by which the defendant charged her own 0-8-0 of the house; it does not also mention the name of the present plaintiff either as a secured or unsecured creditor; it omits to specify the rate of interest on the amount agreed to be borrowed, and fails to specify the extent of the debts alleged to be due to the other creditors pressing hard for payment. It is singularly silent as to the existence and disposal of other assets and does not commit the Defendant No. 1 to a statement that they had been duly applied to the satisfaction of the debts and liabilities or accounted for properly towards the administration of the estate. The grant of the permission by the District Judge was on the face of it very summary and admittedly *ex parte* and without notice to Mt. Jaibai.

These and several other circumstances have a very relevant bearing on the question of the plaintiff's good faith in taking the mortgage in suit after relying upon the permission of the District Judge so as to make it binding as against the interest of Mt. Jaibai and the auction-purchaser,

and on their proof or disproof will depend the question as to how far the permission relied on was obtained by fraud or misrepresentation by the defendant Punabai, and how far the plaintiff knew of or was a party to and participated in such fraud or misrepresentation. In *Sailaja Prosad Chatterjee v. Jadunath Bose* (4) it was held by Sir Ashutosh Mukerjee, that the previous permission referred to in S. 90 which enables an administrator to mortgage the estate implies that there should be a sanction by the Court of all the essential elements of the mortgage transaction; it follows that a mere bald sanction to mortgage is not sufficient, and that stipulations as regards interest and compound interest are essential elements of a mortgage because they affect the burden imposed upon the estate and as such require the Court's sanction. On the principle that the permission must be strictly construed, that learned Judge held that it was within the power of the Court trying the mortgage suit to reduce the rate of interest and award reasonable interest. I would therefore conclude that a non-disclosure, while obtaining permission of full particulars or of material and essential elements of the transaction, or of the conditions to be incorporated in the intended mortgage, as also, of the circumstances leading to the intended transfer, would entitle the Court trying a mortgage suit based on such a mortgage, even though executed with permission, to go behind such permission, and give relief not only against the stipulations for payment of interest and compound interest, but also against other stipulations and conditions which may affect the Court generally to take into consideration all such circumstances as may show that the transaction was not overboard but was one which actually operated to put the lender in a position to make the best of the embarrassing situation in which the administrator was placed or that it was unfair or unreasonable in some other way so as to justify interference with its terms.

The lower Court relies upon the Appellant No. 1's failure to sue for the avoidance of the mortgage in question within time, as a bar to her defence on these points. The transaction being voidable only, its avoidance could, in my

(4) [1915] 21 C.L.J. 88=27 I.C. 715=19 C.W. N. 240.

opinion, be even by setting up a defence to a suit to enforce it, and not necessarily by bringing a suit to have it set aside: cf. *Dhansukhdas v. Jhango* (5) and *Ramaswami Chettiar v. Mallappa Reddiar* (6) and similar cases of transactions voidable, under S. 53 of the Transfer of Property Act, at the option of a creditor, where it is held that the mere fact that a transfer which can be impeached under S. 53 of the Transfer of Property Act is voidable only and must therefore continue in force until set aside, is no sufficient reason for debarring the defendant from relying upon that section.

Under these circumstances the lower Court was not right in refusing to enquire into the defence urged in the case. The case is therefore remanded to the lower Court for consideration of the whole defence upon the merits and for a fresh decision after full trial with advertence to the above remarks. The appellants will get their costs from the respondent Rewaram who along with the other respondents will bear his own. A refund certificate will issue to the appellants in respect of the Court-fee paid on the memorandum of appeal. Costs in the Court below will abide the event.

Case remanded.

(5) [1920] 16 N.L.R. 3=54 I.C. 798.

(6) [1920] 43 Mad. 760=39 M.L.J. 350=12 L.W. 475=59 I.C. 947=(1920) M.W.N. 572 (F.B.).

A. I. R. 1927 Nagpur 62

HALLIFAX, A. J. C.

Narayandas—Plaintiff—Appellant.

v.

Radhabai—Defendant—Respondent.

Second Appeal No. 90 of 1925, Decided on 27th October 1925, from the decree of the Dist. J., Wardha, D/- 20th October 1924.

(a) *Co-sharers—Suit for profits against lambardar—Defendant denying accounts—Preliminary decree for accounts should be given.*

Where the plaint itself calls upon the defendant to produce account books and the defendant denies having any, the only course for the Court to follow is to issue a preliminary decree against the defendant to render an account.

[P. 63, C. 1]

(b) *Evidence Act, S. 102—Suit for profits against lambardar—Burden is on defendant to prove items of expenditure.*

In a suit for profits when certain deductions are to be made from the gross income for expenditure it is for the defendant to prove each item of expenditure alleged by him and not admitted by the plaintiff, with proper accounts and vouchers. [P. 63, C. 1, 2]

(c) *C. P. Land Revenue Act, S. 188 (2) (c)—Suit for profits against landlord—Interest should be allowed from 1st November of the year for which profits are due.*

Under S. 188 (2) (c) of the Land Revenue Act, 1917, the cause of action accrues from 1st of November, therefore, interest on profits should be allowed from that date and not from the last day of the agricultural year when they became due. [P. 63, C. 2]

S. K. Barlingay—for Appellant.

A. S. Osborne and *M. D. Kolte*—for Respondent.

Judgment.—The plaintiffs sued for the accounts of the profits of two villages received by the defendant as lambardar of them both during the three years beginning on the 1st of May 1919, and for payment of his share of them. He alleged that the total amount available for distribution, that is the excess of the income over the expenses, was Rs. 8,117. His share of this sum would be Rs. 2,450-15-6, and to this he added interest from the last day of each year and so claimed Rs. 3,032-3-6. The details of the statement he filed with his plaint were obtained mainly from the defendant's own account books, which he had seen, at least partly, when he was endeavouring to ascertain from her what the amount due to him really was.

In reply the defendant admitted that she was the lambardar and that the plaintiff was a co-sharer to the extent alleged by him. She however filed no accounts, but merely an abstract of the totals of income and expenditure alleged by her during the three years. She said the income was Rs. 16,467-3 and the expenditure Rs. 11,797-14-9, so that the balance for distribution was only Rs. 5,669-4-3. The plaintiff's share of this would be Rs. 1,720-9-3. It is admitted that he has to pay Rs. 85-5 each year to the other co-sharers on account of khudkasht land separately cultivated by him, so that the sum payable by the defendant on her own figures seems to be Rs. 1,464-10-3. It is however, stated, to be Rs. 1,172-8-6.

The plaintiff itself called upon the defendant to produce her account books. She began by committing perjury which was both obvious and futile by saying she had none. Anyhow the only course then for the Court to follow, which neither Court did follow, was to issue a preliminary decree against her ordering her to render an account. Instead of that the plaintiff had to show that she had got books, which he did conclusively and she was again ordered to produce them. In spite of all that, these books have never yet been produced, though their existence and their present possession by the defendant are now fully admitted. What is more, neither the defendant herself nor any agent of hers dared to enter the witness-box till she and the agent in charge of her accounts were haled there by the plaintiff.

Even without the preliminary decree for the rendition of accounts that ought to have issued and even if the suit is to be treated as one for money in which the plaintiff had to show how much was due to him, that seems to me to end the matter. The defendant admitted that the income was in excess of the balance for distribution alleged by the plaintiff, but said that the expenditure was greater than what he had allowed. She was further forced to admit that she had good evidence to support that statement if it were true, but steadily and even contumaciously refused to produce it. No sane person could possibly draw any inference from this, but that the statement is false.

That result, as might be expected arises, from the application of either the Evidence Act or the principles of ordinary commonsense to the case. An attempt was made in *Jailal Sao v. Lal Fateh Singh* (1) to set out an explanation of this very simple matter, but it has not been understood, and practically every statement made by the defendant in respect of minor details of the accounts has been accepted unless the plaintiff managed to prove it separately to be untrue. But, with a few alterations of petty details, her obviously untrue statement of the balance available for distribution has been accepted as true. It was for her to prove each item of expenditure alleged by her and not admitted by

the plaintiff, with proper accounts and vouchers, and she had refused to prove even one.

In respect of interest, this appears to me peculiarly a case in which it ought to be granted. It is quite clear that demands were made long before the written notice of the 17th of November 1922 was sent, and that the defendant has wrongfully evaded her statutory duty of explaining the accounts to the plaintiff within six months of the end of each agricultural year; she has refused to produce them even now, and if the Courts below had been alive to their duty a preliminary decree for the production of them would have issued against her at the beginning of the case.

As it is, nothing can be done but to pass a decree for the full amount claimed by the plaintiff as due to him on the accounts. But interest will not run from the 1st of May of each of the three years, but from the 1st of November, that being the date on which the cause of action accrued under S. 188 (2) (c) of the Land Revenue Act, 1917. The decree of the lower appellate Court will be set aside and in its place a decree will issue ordering the defendant to pay to the plaintiff the sum of Rs. 3,000 with interest at 1 per cent. per mensem from the 1st of November 1923 to the date of payment, and also the whole of the costs incurred by him in all three Courts.

Suit decreed.

A. I. R. 1927 Nagpur 63

HALLIFAX AND MITCHELL, A. J. Cs.

Sahetrao—Defendant—Applicant.

v.

Jayawantrao and *another*—Plaintiffs—Non—applicants.

Misc. Petition No. 41-B of 1924, Decided on 14th July 1926.

Civil P. C., S. 110—Inheritance of "Lawa jama" in Berar—Question as to the law applicable was held to be a question of public importance.

The question whether the inheritance of the cash allowances known comprehensively in Berar as "lawa-jama" is governed by the Inam Rules or by the law relating to ordinary pensions, was held to be a question of considerable public importance. [P. 64, C. 1]

H. S. Gour, K. V. Brahma and *K. V. Deoskar*—for Applicant.

V. C. Pande—for Non—Applicants.

(1) A. I. R. 1924 Nag. 117=20 N. L. R. 52.

Order.—It is well known that in Berar a watan has a sentimental value out of all proportion to its cash value, but still, we cannot hold that, for purposes of jurisdiction, the value of a half-share in an annual payment of Rs. 768-8-0 exceeds Rs. 10,000. This case therefore cannot fall within S. 110 of the Civil P. C. The appeal, however, raises the question whether the inheritance of cash allowances known comprehensively in Berar as "lawa-jama," is governed by the Inam Rules or by the law relating to ordinary pensions. This is undoubtedly a question of considerable public importance, involving many families of position. We consider therefore that the case falls within the scope of S. 109 (c), and we accordingly certify that it is a fit one for appeal to His Majesty in Council.

A. I. R. 1927 Nagpur 64

FINDLAY, J. C., AND PRIDEAUX, A. J. C.

Balwant and others—Appellants.

v.

Sheodas—Respondent.

Second Appeal No. 398-B of 1923, Decided on 24th November 1925, from the appellate decree of the Addl. Dist. J., Akola, D/- 5th October 1923.

Limitation Act, Art. 10—Transfer of undivided share is not capable of physical possession within Art. 10.

The transfer of an undivided share in a field cannot be deemed to be capable of physical possession within the meaning of Art. 10: 4 All. 24; A. I. R. 1922 Nag. 14 and 24 All. 17 (P. C.), Rel. on. [P 64, C 2]

M. B. Niyogi—for Appellants.

A. V. Khare—for Respondent.

Opinion.—The question referred for our decision is:

whether the transfer of an undivided share in a field can be deemed to be capable of physical possession within the meaning of Art. 10 of the Limitation Act.

Both the lower Courts have found against the contesting defendants on this point, and we have no doubt that their decisions are correct.

It is contended for the appellants that actual 'physical possession' was given of the share; but it is clear that what was given to the decree-holder in the foreclosure suit was but symbolical possession. The share is admittedly an undivided one, and in such a case O. 21, R. 35, Cl. (2) would apply, and possession

should be given by affixing a copy of the warrant in some conspicuous place on the property and proclaiming by beat of drum, or other customary mode, at some convenient place, the substance of the decree. In the present case the warrant of possession does profess to give physical possession of the undivided share. That could not have been given and the possession was symbolical and admittedly what the decree-holder got was joint possession. It is settled law that a share in an undivided zamindari mahal is not susceptible of physical possession, *Unkar Das v. Narain* (1) and that shamilat land is not susceptible of physical possession: 4 P. L. R. 8. It seems that till a purchaser takes possession of the property or his sale deed is registered, Art. 10 does not provide any period for limitation and that Art. 120 therefore applies: see *Rai v. Sidakalli* (2) and it was held by Stanyon, J. C., in Second Appeal No. 46 of 1917, decided on the 3rd September of that year, that there can be no physical possession of an interest in an unascertained area. Their Lordships of the Privy Council held in *Batul Begum v. Mansurali Khan* (3) that where the subject of sale does not admit of physical possession and there is no registered instrument of sale, a suit for pre-emption is governed by Art. 120 of Schedule II of the Limitation Act, and not by Art. 10. In the present case there is no sale deed, and the cause of action is based on the foreclosure decree and the right arises under S. 205 of the Berar Land Revenue Code of 1896. Art. 10 of the Limitation Act deals only with sales, and therefore we do not see how it applies to the present case, as there has been no deed of sale executed, and therefore necessarily not registered. We hold that in the present case transfer of an undivided share in the field is not capable of physical possession on the decree in the mortgage suit, and that Art. 10 of the Limitation Act does not apply.

Let the record be returned.

Reference answered.

(1) [1881] 4 All. 24=(1881) A. W. N. 116 (F. B.).

(2) A. I. R. 1922 Nag. 14.

(4) [1902] 24 All. 17=28 I. A. 248=8 Sar. 133 (P. C.).

A. I. R. 1927 Nagpur 65

FINDLAY, O. J. C., AND PRIDEAUX,
A. J. C.

Shankar Rao and another—Defendants—Appellants.

v.

Pandurang and others—Plaintiffs—Respondents.

First Appeal No. 10 of 1924, Decided on 24th November 1925, from the decision of the Addl. Dist. J., Nagpur, D/-20th October 1923, in Civil Suit No. 20 of 1923.

(a) *Hindu Law—Reversioner—Common ancestor must be proved by a reversioner to succeed as collateral heir.*

Where the plaintiffs claim as collateral heirs, it is incumbent on them to show who the common ancestor was: 6 Cal. 626, *Foll.* [P 66 C 1]

(b) *Hindu Law—Alienation—Creditor's wrong belief but based on bona fide inquiry sustains alienation.*

If a creditor, before embarking on transactions has made reasonable and bona fide inquiry and has satisfied himself to the best of his knowledge and belief that legal necessity exists, the real existence of such legal necessity in point of fact is not a condition precedent to his success: 6 M. I. A. 393, *Hanuman Prasad's case, Foll.*

[P 66 C 2]

H. S. Gour and M. R. Bobde—for Appellants.

M. Gupta and V. D. Kale—for Respondents.

Judgment.—The twelve plaintiffs-respondents filed the present suit in the Court of the Additional District Judge, Nagpur, under the following circumstances: They claimed to be the nearest reversioners of one Sakharam Kolte who died in 1873. Sakharam left no issue, his widow Radhabai alone surviving him. She inherited from her husband a 16 annas share in monzas Deoli and Khapri (Nagpur). On 30th March 1892, she sold 0-8-0 share in each of these villages to the Defendant-Appellant No. 1's elder brother. A fortnight later, she mortgaged the remaining 0-8-0 shares in both the villages for Rs. 700 to the same vendee, and eventually sold him the latter shares also on 30th September 1895 for Rs. 1,435. Under a private arrangement 0-1-0 share of the second 0-8-0 share was taken back by Radhabai nearly a year after the sale of 1895. The plaintiffs thus sued for possession of 0-15-0 share in two villages named, both now having been amalgamated into the single village named mauza Deoli Peth.

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The plaintiffs' allegations were that the above-mentioned sale and transaction were executed without legal necessity and were not binding on them as nearest reversioners. At a partition between Defendant 1 and his elder brother, the property fell to the former's share; hence the Defendant 1 and his minor son were sued as being in joint possession of the property. Apart from preliminary objections about the value of the Court-fee payable and the like, the defendants' position was that the plaintiffs were not the nearest reversioners. They further pleaded that both the sale and mortgage of 1892 and the sale of 1895 were for legal necessity, and further that the sale and mortgage transactions of 1892 were consented to by one Gopal Govind Kolte who represented himself then as being the nearest reversioner. Other incidental pleadings were raised on behalf of the defendants, and these will be referred to later as far as may be necessary.

On the issues which arise on these pleadings the Additional District Judge came to the following findings:

(a) That the plaintiffs were the nearest reversioners of Sakharam;

(b) That neither the sale or mortgage of 1892 were for legal necessity;

(c) That Gopal Govind Kolte had consented to the two transactions of 1892, but he was not then the nearest reversioner and his consent is not binding on the present plaintiff-respondents;

(d) That the sale of 1895 was not for legal necessity;

(e) That the plaint was properly stamped;

(f) That the plaintiffs can only claim an account of the profits for the period following the date of the suit being filed;

(g) That the defendants have not been proved to have made any improvements in the property.

A decree was accordingly passed in favour of the plaintiffs subject to their paying Rs. 160-1-4 to the defendants in respect of the alleged losses incurred by Defendant 1's brother during three years he had managed the villages on Radhabai's behalf.

The defendants have now appealed to this Court. On the appeal coming on for hearing, ground No. 7 which was to the effect that the consent of Gopal Govind to the sale and mortgage of 1892 was

effectual was not pressed. Similarly also as regards the 9th ground, in which it was urged that, even if the two sales and mortgage attacked in this suit were held not to be binding on the plaintiffs, they were entitled to a refund of the amount of the consideration paid by them in the transactions mentioned. There thus in effect remain 4 points for consideration in this appeal. The four positions taken up on the appellants' part may be summarised as follows :

(1) That the plaintiffs have failed to prove that they are the nearest reversioners of Sakharam ;

(2) That for some 30 years the plaintiffs have lain low and taken no action in the present matter ; although this may not amount to technical acquiescence on their part, a less rigid standard of proof should be demanded of the defendants in view of the time which elapsed, and the difficulty of now procuring apposite evidence in support of their defence ;

(3) That even if legal necessity has not been categorically proved, there has been ample proof that the defendants' predecessors in title, before embarking on the transactions now sought to be attacked, made reasonable bona fide enquiry and that this was in the circumstances sufficient ;

(4) That there was legal necessity for the transactions in question.

We will deal first with the allegations that the plaintiffs have failed to establish that they are Sakharam's nearest reversioners. It has been urged on behalf of the appellants that, as the plaintiffs claim as collateral heirs, it was incumbent on them to show who the common ancestor was cf. *Kedarnath Doss v. Protal Chunder Doss* (1). (After discussing evidence it was held that plaintiffs were nearest reversioners of Sakharam).

We now pass to the next point which has been urged on behalf of the appellants, viz., that although there may be no question of technical acquiescence in the present suit, the fact that the plaintiffs have delayed so long in filing it should have considerable weight attached to it in weighing the evidence on record because of the great difficulties the defendants now labour under in proving legal necessity and the like. Their Lordships of the Privy Council in *Hunooman Persaud*

Panday v. Mt. Babooee Manraj Koonwaree (2) alluded to a similar matter. It seems to us, however, that this consideration cuts both ways. Just as it may be comparatively difficult for the defendants now to procure convincing and specific evidence on a question like that of legal necessity or enquiry, so also the plaintiffs labour under a similar difficulty. We are quite willing, however, to admit that in a case like the present, in weighing the evidence on either side, it is incumbent on us to remember the difficulty under which the respective parties labour particularly as regards ascertainment and production of evidence on the matters dealt with in the case. Beyond this we do not find it possible to go. There is admittedly no question of estoppel in the present case nor even of technical acquiescence. The plaintiffs were in the line of reversioners, but had only a spes successionis. Mt. Radhabai died on 21st October 1920 and the present suit was filed within some 15 months of that date. It was clearly not incumbent on them to file the suit during Mt. Radhabai's lifetime and from their point of view, there might have been great difficulties and disadvantages in doing so.

We pass, therefore, to the next position taken up on appeal viz., that it would be sufficient for the defendants to show that they have made reasonable enquiries as to the existence of the legal necessity, and that if this were established that they were entitled to be absolved, even if it should afterwards be ascertained that the result of the reasonable and bona fide enquiry was a mistaken one. We accept the principle that if a creditor, before embarking on transactions such as we are concerned with here, has made reasonable and bona fide enquiry and has satisfied himself to the best of his knowledge and belief that legal necessity exists, the real existence of such legal necessity in point of fact is not a condition precedent to the success of the defendants. That principle is clearly laid down in S. 38 of the T. P. Act and the illustration thereto.

We proceed, therefore, to discuss whether there has been proof of such reasonable bona fide and thorough enquiry as the circumstances of this case would have demanded of D. W. 7, Sir Gangadhar

(1) [1881] 6 Cal. 626.

(2) [1854-57] 6 M. I. A. 393=18 W. R. 81=2 Suther. 29=1 Sar. 552 (P. C.)

Rao Chitnavis. We may say at once that the high position and attainments of this gentleman as revealed in his evidence would not make us regard the evidence as anything, but unimpeachable. It is happily, however, not necessary for us to have to offer any criticism of his evidence in this connexion. (After discussing evidence the judgment proceeded.) We do not think there is any proof whatever of such reasonable and bona fide enquiry as would discharge the burden of proof which rested on the defendants in this connexion.

We now pass to the next point for decision in this appeal, viz., as to whether there was actual legal necessity for the transactions in suit or not. (On evidence it was held that actual legal necessity was not proved.) The appeal accordingly fails and is dismissed with costs. Appellants must bear respondents' costs.

A cross-objection has been filed by the respondents to the effect that they should not have been ordered to pay, as a condition precedent to their acquiring possession of the subject in suit, Rs. 160-1-4, said to have been lost during Sir Gangadhar Rao Chitnavis's management of the village from 1892 to 1895. We are not satisfied that there has been any sufficient proof with regard to this item. Apparently for a good many years after Sakharam's death, the widow and her brothers between them managed to carry on the management of the villages with comparative success. From the account entries we have no sufficient details regarding this alleged item of loss and it must be remembered that the village was managed, as it was, apparently as a result of a private understanding. The mortgage of 1892 was not a possessory one. In those circumstances we do not think the defendants are entitled to a refund of Rs. 160-1-4 in question and the following phrase will be deleted from the judgment of the lower Court :

The possession of 7 annas share in mouza Deoli is subject to payment by the plaintiffs to the defendants of Rs. 160-1-4 with interest thereon at 12 per cent. per annum from the date of suit till payment.

The cross-objection filed by the respondents will succeed in appeal, and the appellants will also bear the costs of the respondents' cross-objection.

*Appeal dismissed.
Cross-objection allowed.*

A. I. R. 1927 Nagpur 67

HALLIFAX, A. J. C.

Chunnu and another—Appellants.
v.

Subheti and others—Defendants—Respondents.

Second Appeal No. 510 of 1925, Decided on 9th September 1926, from the decree of the Dist. J., Chhindwara, D/- 15th August 1925, in Civil Appeal No. 49 of 1925.

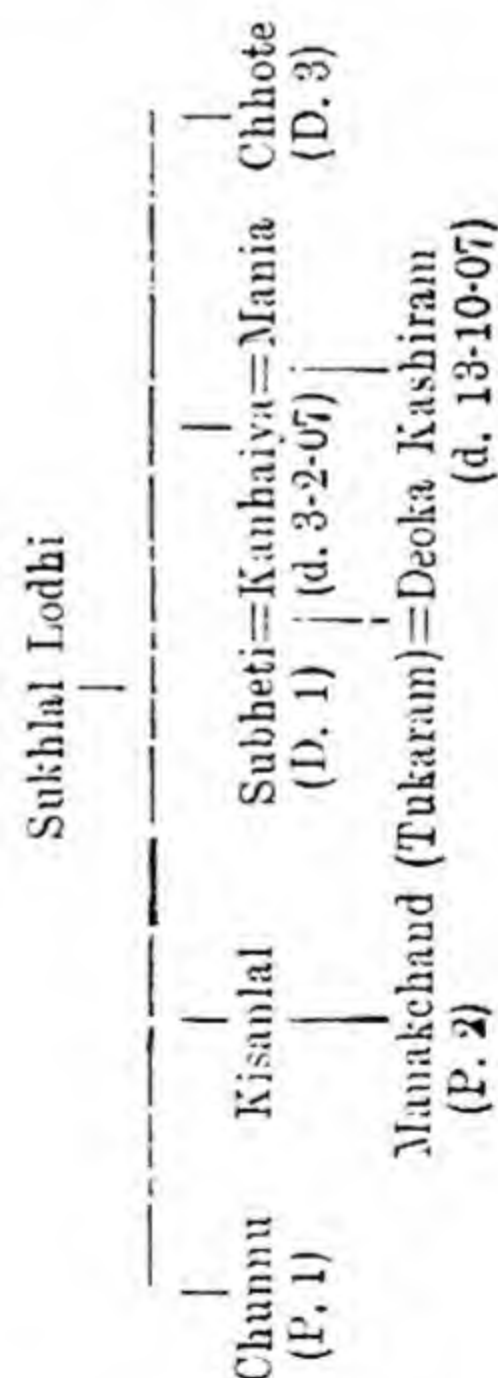
Adverse possession—Possession in assertion of ownership to half undivided share—Title can be perfected only as regards that half.

It is impossible to obtain by prescription anything more than is claimed. If a man asserts that he is the owner of an undivided half share in property, and holds possession of it for twelve years, he becomes the owner of that half-share only, not of the whole property. [P 68 C 1]

A. Bhagwant and S. A. Ghadge—for Appellants.

S. V. Manjrekar—for Respondents.

Judgment.—The relationships and dates set out in the following table are relevant :



Sukhlal and Kisanlal died before the present suit was filed on the 8th of September 1924. Kashiram was born on the 25th of May 1907, nearly four months after the death of his father Kanhaiya, and he died in less than five months after his birth. His mother Mania took

Chhote, Kanhaiya's brother, as her second husband in the following year, that is 1908.

The mistake of fact made all through the case is in the assumption that the members of this Lodhi family knew as much of the Hindu Law of inheritance applicable to this case as can be discovered by the Courts now on an examination of it. On Kanhaiya's death Subheti and Mania were his heirs and took possession of his property. During Kashiram's short life he was the owner of it, and at his death his mother Mania was his heir. But the two widows remained in joint possession, and when Mania married again in 1908 Subheti was allowed to remain in sole possession. It is clear then that they both, like everybody else, regarded themselves as entitled to the property as Kanhaiya's widows. The idea that Mania was the sole owner after her short-lived son, and that Subheti came in as a trespasser with no title at all on Mania's marriage, obviously never entered the heads of either of them or of any of their husbands' relatives.

Now it is impossible to obtain by prescription anything more than is claimed; you cannot keep more than you take. If a man asserts that he is the owner of an undivided half share in property, and holds possession of it for twelve years, he becomes the owner of that half share only, not of the whole property. Similarly, Subheti asserted that she had the interest that Kanhaiya's widow would have had in the property if Kashiram had never been born, and she has established her right by prescription to that interest, but to no more. She can keep what she took, although, she had no right to take it; but obviously she cannot keep what she never took and never held. She has by her adverse possession perfected the title she asserted, that is, her own title as Kanhaiya's heir.

The whole estate must then be treated as one inherited by Subheti from her husband Kanhaiya, and the intervening ownership of Kashiram for five months must be left out of account now, just as it was in 1908. Kanhaiya's next heir is Deoka, his daughter, and the estate transferred by gift to her is the whole estate inherited by Subheti from Kanhaiya. The transfer is therefore perfectly legal, though in that view of the

case, it is really not a transfer but a relinquishment by Subheti and a subsequent taking of the estate by Deoka in her own right as the next heir of Kanhaiya. In that capacity she takes it as owner for her life, and on her death it will pass to Kanhaiya's next reversioners then existing. At present they are only Chunnu and Chhote, the second plaintiff Manakchand coming after both of them.

One of the defences to the claim to set aside the deed of gift, which was not examined, was that the property never belonged to Kanhaiya at all, having come to Subheti from her mother. As however the suit must be dismissed on the plaintiffs' own allegations, that need not be discussed. It may be mentioned that if Subheti could be regarded as in possession of the property otherwise than as Kanhaiya's heir as she was in the Courts below, the considerations governing the judgments of those Courts would have little application to practically the whole of the property in question, which consists of two occupancy holdings with a total area of 93.45 acres; the rest is only two houses and a kotha attached to one of them.

The appeal will be dismissed and the appellants will pay the whole of the costs of both parties in all three Courts.

Appeal dismissed.

A. I. R. 1927 Nagpur 68

KINKHEDE, A. J. C.

Bhagwandas and another — Defendants—Appellants.

v.

Gajadhar—Plaintiff—Respondent.

Second Appeal No. 402 of 1924, Decided on 13th September 1926, from the decision of the Addl. Dist. J., Damoh, D/- 25th July 1924, in Civil Appeal No. 39 of 1924.

(a) *C. P. Tenancy Act (1920), S. 11, Prov. 2—“Collaterals” and “kindred”—Words should be construed differently so as to suit the principles of personal law of each tenant.*

The primary meaning of the words “collaterals” and “kindred” cannot be treated as the only meaning which the legislature intended to assign to them when used in the Tenancy Act. It would be proper to say that those words have only such technical meaning as they may bear under the system of personal law applicable to the tenant concerned, so that it should be open

to the Court to put such different constructions on them as the personal law of inheritance of the particular tenant may justify. [P. 70, C. 2]

(b) *C. P. Tenancy Act, S. 11, Prov. (2)—“Collaterals”*—In the case of Hindu married woman's self-acquired occupancy tenancy rights “collaterals” means her husband's collaterals.

In interpreting the rule of inheritance enunciated in S. 11, read with second proviso, as applicable to the devolution of a Hindu married woman's self-acquired occupancy tenant right, the word “collaterals” should be construed as the collaterals of her husband. [P. 71, C. 1]

(c) *Hindu Law—Inheritance—Husband's collaterals become wife's collaterals after marriage.*

A female by her marriage leaves the gotra of her father and enters the gotra of her husband and becomes the gotraja sapinda of his gotraja sapindas, i. e., the collaterals of her husband become her own collaterals. [P. 71, C. 1]

(d) *Hindu Law—Marriage—Presumption is in favour of marriage in approved form.*

The presumption is that a marriage has taken place in an approved form rather than in disapproved form; 11 M. I. A. 139 (P. C.) and 38 Cal. 700 (P. C.), Rel. on. [P. 69, C. 2]

(e) *C. P. Tenancy Act, S. 11—Provisions apply to female tenant also.*

The provisions of S. 11 are to be read as applicable to male as well as female tenants mutatis mutandis. [P. 69, C. 2]

(f) *Interpretation of statute—Proviso excepts something out of the section.*

A proviso excepts out of a previous section, or out of the earlier part of the section which contains something which, but for it would have been within the enacting part. [P. 70, C. 1]

V. R. Pandit and W. R. Puranik—for Appellants.

G. L. Subhedar—for Respondent.

Judgment.—This 2nd appeal raises a question of the interpretation of a statute. A brief statement of the facts is necessary. One Girdhari held the land in suit as occupancy tenant under the plaintiff-respondent. He died issueless and was succeeded by his widow. On her death his holding was taken up by his sister Mt. Sita who was recognized by the landlord as the tenant of the land in suit. It is common ground that the tenancy right was personal property or stridhan in her hands. On her death the defendants who are proved to be her husband's sagotra sapindas within seven degrees of kindred to him took possession of her lands. The plaintiff as the landlord of the holding sues to eject them as trespasser on the ground that the tenancy lapsed to him for want of heirs and that the defendants are not collateral heirs of his tenant Mt. Sita within the meaning of S. 11, proviso (ii) of the new C. P. Tenancy Act of 1920.

The first Court dismissed the suit hold-

ing that the tenancy did not lapse but legally devolved on the defendants. On appeal by plaintiff the lower appellate Court reversed the decision and granted a decree for possession, in the view that though defendants were the collateral heirs of Mt. Sita's husband they were not her collaterals and as such were excluded from inheritance under the 2nd proviso to S. 11 of the Act. The defendants have therefore come up in 2nd appeal.

It is contended on their behalf that the provisions of S. 11 and its 2nd proviso have not been rightly construed by the lower appellate Court. I think this contention is sound and must prevail. The relevant portion of the section in question with its proviso may be reproduced here for facility of reference:

11. The interest of an occupancy tenant shall on his death pass by inheritance in accordance with his personal law;

Provided that

(ii) no collateral shall be entitled to inherit unless he is a male in a male line of ascent or descent and within seven degrees of kindred from the tenant.

It is common ground between the parties and also clear from S. 12 (1) of the C. P. General Clauses Act 1 of 1914 that unless there is anything repugnant in the subject or context words importing the masculine gender shall be taken to include females. It therefore follows that the provisions of S. 11 are to be read as applicable to male as well as female tenants, mutatis mutandis. The interest of a female occupancy tenant must consequently on her death pass by inheritance in accordance with her personal law. This personal law for a married Hindu female tenant who owns her tenancy in absolute right must necessarily be that branch of Hindu Law which governs devolution of a married woman's stridhan according to the school to which she belongs. Her heirs must therefore be from amongst the class of heirs who are entitled to succeed to her other stridhan property under the Hindu Law applicable to her.

It is not disputed and may therefore be presumed that Mt. Sita was married in one of the approved forms of marriage: see *Mt. Thakoor Deyhee v. Rao Baluk Ram* (1), *Jagannath v. Narayan* (2).

(1) [1866] 11 M. I. A. 139=10 W. R. 3=2 Suther. 49=2 Sar. 231 (P. C.).

(2) [1910] 34 Bom. 553=7 I. C. 459=12 Bom. L. R. 545.

Kanakku Nagalinga v. Nagalinga (3) and *Moji Lal v. Chandrabati Kumari* (4). As the succession to the stridhan of a married woman goes to her paternal and maternal relations only if the marriage is in a disapproved form, we must leave them out of account in this case. It would be seen that the question is thus very much narrowed down—when the substantive part of an enactment itself eliminates certain persons from the list of heirs to a married woman's property can a proviso to that section open a door for them, or in other words does a proviso enlarge or restrict the scope of the earlier enacting part of a statute. We have the following rule of interpretation in Lord Halsbury's *Laws of England*, Vol. 27, S. 3, para. 247, at pp. 137 :

Among the parts of a statute which must be considered in arriving at its true meaning are the sections or parts of sections known as provisos, exceptions, and saving clauses.

A proviso excepts out of a previous section, or out of the earlier part of the section which contains, something which but for it would have been within the enacting part.

The section and the 2nd proviso read together in the list of this rule when applied to the devolution of a married Hindu female's tenancy right, limit the heirship primarily to the husband's line of sapindas in ascent or descent from him and further restrict it to seven degrees of kindred from the husband of the female tenant

The respondent's counsel argues that the words "kindred" and "collateral" as used in the 2nd proviso should be constructed in their primary meaning as designating 'persons descended from the same stock or common ancestor,' and refers me to the definition of those words as given in Ss. 20 and 22 of the Indian Succession Act of 1865 and the corresponding Ss. 24 and 26 of the new Indian Succession Act of 1925. In the absence of any definition of the words 'kindred' or 'collateral' in the Tenancy Act of 1920 or in the C. P. General Clauses Act of 1914, it may at first sight appear plausible to accept the definitions in the Succession Act. But as it is expressly laid down in S. 23 of the new Succession Act itself that part 4 in which these definitions occur does not apply to Hindus,

(3) [1910] 32 Mad. 510=4 I. C. 871=19 M. L. J. 480.

(4) [1911] 38 Cal. 700=11 I. C. 502=38 I. A. 122 (P. C.).

Muhammadans &c. I think it is proper to confine them to cases strictly coming under that Act; I think their extension to the case of a Hindu under the Tenancy Act would be unwarranted by law. If to be kindreds or collaterals of one another both persons must be descended from the same stock or common ancestor, a Hindu married female and her husband's collateral heirs cannot be said to be descended from the same stock or common ancestor in the strictly literal sense of those words; only the relations of such a woman though married in approved form on the paternal and maternal side would in that view have to be brought in to the exclusion of her husband's kindred, simply because she is descended from their stock and not of her father-in-law.

Lord Halsbury's *Laws of England* Vol. 27, para. 243, contains the following rule of interpretation on that point :

As a word is primarily to be construed in its literal and popular sense, so an enacting section is to be understood according to the ordinary meaning of the words composing it. The only exceptions to this rule are where some other section in the statute shows that the ordinary meaning is to be enlarged or cut down, or where its literal construction would be repugnant to the general purview. For the primary meaning is not always the parliamentary meaning, and any construction which leads to absurd results or produces injustice should if possible be avoided.

It is thus clear that to construe the words 'kindred' and 'collateral' as used in the 2nd proviso literally and to interpret them on the lines of the definitions of those words as given in the Indian Succession Act is to bring in the heirs on the father's or mother's side which could not have been the intention of the earlier part of the section to include. A construction which would lead to such absurd results should be avoided. The primary meaning of those words cannot therefore be treated as the only meaning which the Legislature intended to assign to them when used in the Tenancy Act. Under these circumstances I am of opinion that it would be proper to say that those words have only such technical meaning as they may bear under the system of personal law applicable to the tenant concerned, so that it should be open to the Court to put such different constructions on them as the personal law of inheritance of the particular tenant may justify.

The same result follows even if we consider it purely from the point of view of Shastric texts of Hindu Law. The following extracts taken from Sir Bose, A. J. C.'s decision in *Bayana v. Dinkar* (5) will illustrate this :

Similarly arises the sapinda relationship of the husband with the patni (lawfully wedded wife), by reason of their together forming one body, i. e., one person ; hence the wife is called half the body of the husband Thus wherever the term sapinda is used there directly or mediately connexion with parts of the body is to be understood. the real meaning of the text is that they become each other's sapindas from the moment of their marriage. By marriage a female 'is born again in the family of her husband', to use the expressive language of Hindu lawyers. With her marriage she leaves the gotra of her father and enters the gotra of her husband and becomes the gotraja sapinda of his gotraja sapindas.

This clearly makes the collaterals of her husband her own collaterals.

On the findings arrived at in the Courts below it is evident that the defendants-appellants are the collateral heirs of Mt. Sita's husband and they are also within seven degrees of kindred from him. As such they are under Hindu Law entitled to inherit her other stridhan. The logical conclusion resulting from these findings therefore is that they should be also necessarily come in as heirs to her peculium or to such interest as she owns absolutely in her self-acquired occupancy holding under the C. P. Tenancy Act of 1920.

The result then is that the decision appealed against cannot be upheld as sound or warranted upon a proper and correct interpretation of the rule of inheritance enunciated in S. 11, read with the second proviso, of the aforesaid Tenancy Act of 1920 as applicable to the devolution of a Hindu married woman's self-acquired occupancy tenant right. The appeal is therefore allowed and it is ordered that the decree of the lower appellate Court be reversed and that of the 1st Court restored with costs of both parties in all three Courts to be borne by the plaintiff-respondent.

Appeal allowed.

A. I. R. 1927 Nagpur 71

FINDLAY, O. J. C.

Wasudeo—Accused—Applicant.

v.

King-Emperor—Opposite Party.

Criminal Revision No. 109-B of 1925, Decided on 28th August 1925, from the judgment of the S. J., Amraoti, D/-9th May 1925, in Criminal Appeal No. 82 of 1925.

(a) *Criminal P. C., S. 342—Formal question in general terms is sufficient compliance with S. 342.*

A formal question in general terms is a sufficient compliance with the mandatory provisions of S. 342, although in a particular case it may be open to, and advisable for the Court, in the exercise of its discretion, to put more specific questions : *Newbould, J.* in *A. I. R. 1925 Cal.* 361, *Foll.* [P 72, C 1]

(b) *Criminal P. C., S. 195—Alteration in the Code does not invalidate proceedings begun before it.*

The alteration in the law of procedure relating to the grant of sanction cannot invalidate proceedings validly begun under the old procedure : *A. I. R. 1925 Mad.* 1122, *Foll.* [P 72, C 1]

V. V. Chitaley—for Applicant.

G. P. Dick—for the Crown.

Order.—The applicant Wasudeo was convicted by the Magistrate, with S. 30 powers, of the Yeotmal district, of offences punishable under Ss. 467 and 471, read with S. 109, Indian Penal Code, and sentenced to two years' rigorous imprisonment for each offence, the sentences to run consecutively. The Sessions Judge, Amraoti, allowed the appeal as regards the conviction under S. 467/109, but upheld the conviction under S. 471, Indian Penal Code.

The facts of the case have been fully stated in the judgment of the Sessions Judge and it is unnecessary to repeat them here. No attempt has been made on behalf of the applicant to attack the findings of fact which have been arrived at by the Sessions Judge. Certain technical questions have, however, been raised and I now proceed to deal with them.

The second ground which appears in the application is that the provisions of S. 342, Criminal Procedure Code, have not been sufficiently complied with. This refers to the further examination of the accused on 1-10-1924, after Sita (P. W. 1) and Ganpati (P. W. 3) has been cross-examined. It has been suggested that it was insufficient to merely ask the applicant whether he had anything more

to say with reference to the cross-examination of these witnesses, which had been concluded. I find it impossible, in the circumstances of the present case, to hold that there was any necessity for the Court to have put more specific questions to the applicant in this connexion. For my own part, I concur with the observations of Newbould, J., in *Emperor v. Alimuddin* (1), that a formal question in general terms is sufficient compliance with the mandatory provisions of S. 342, although, of course, in a particular case it may be open to, and advisable for the Court, in the exercise of its discretion to put more specific questions. No reason whatever for presuming that the applicant has been prejudiced in this connexion, has been made out in this Court.

It was also mentioned in the course of argument that the previous examination of the applicant was of a somewhat inquisitorial nature, but the terms thereof seem to me to have left him ample opportunity for explaining instances in the evidence which appeared to be against him.

A new legal point, which I allowed to be added in the application on the day of hearing was also raised, e. g., that the provisions of S. 195, Criminal Procedure Code, as recently amended, have not been complied with in this case. It has been argued that it is true that the sanction was granted before the amending Act to the Criminal Procedure Code came into force; but, it has been urged, that cognizance was only taken of the case thereafter, viz., on 23-1-1924. It is clear, however, that cognizance of the case was really taken long before, viz., on 6-6-1923. I am in full agreement with the decision of Wallace and Nair, JJ., in *Appasamy Aiyar, In re.* (2), on this question. The alteration in the law of procedure relating to the grant of sanction can, obviously not invalidate proceedings validly begun under the old procedure. Had this been the intention of the Legislature, it would have been translated into appropriate language in the piece of the legislation concerned. I see no cause, therefore, for entertaining this ground of revision.

The third ground of revision, viz., that three Court witnesses had been examined even prior to the prosecution evidence,

was not pressed and had obviously no chance of success.

On the merits all that has been urged is that Wasudeo was only an agent and that there has been no positive proof that he had knowledge that the documents were forged. The circumstances in *In Re Ranchhodas* (3), relied upon by the pleader for the applicant, were wholly different from those of the present case. It seems utterly impossible, on any reasonable view of the evidence, to assume that Wasudeo took an innocent part in the matter. The considerations advanced by the Sessions Judge and by the Magistrate seem to me absolutely conclusive in this connexion. The whole civil case was in the hands of the applicant and it was very clearly he who was the ringleader and carried out the crime. There is no possible ground for interference on revision in this connexion, and for the same reason I am unable to hold that the Magistrate has erred in making the differentiation of punishment he has between Wasudeo on the one hand and Gangu, the so-called principal, on the other. As remarked by the Sessions Judge, it is perfectly obvious that Gangu was a mere cat's paw in the hands of the others and the circumstances were such as to entitle her only to some measure of leniency.

The application for revision is accordingly dismissed.

Application dismissed.

(3) [1898] 22 Bom. 317.

A. I. R. 1927 Nagpur 72

KINKHEDE, A. J. C.

Collector of Nimar—Applicant.

v.

Lakhmichandsa—Non-applicant.

Civil Reference No. 250 of 1926, Decided on 30th September 1926, from the order of the Small Cause Court J., Khandwa, in Suit No. 531 of 1926.

(a) *C.P. Stamp Law Rulings Circulars* (1887), Nos. 7, 9, 11 and 12—*Agreement must be for price paid or promised.*

An agreement for sale of goods or merchandise within the meaning of the C. P. Stamp Law Rulings Circulars Nos. 7, 9, 11, and 12 of 1887, is one in consideration of a price paid or promised and not one to deliver goods in exchange for goods and further it must be unattested.

[P 73, C 2]

(1) A. I. R. 1925 Cal. 361—52 Cal. 522.

(2) A. I. R. 1925 Mad. 1122.

(b) *Stamp Act — Estimate of stamp duty payable—Primary contract between parties must be looked at and not other stipulations provided.*

In estimating the stamp duty payable on an instrument, what Court should look at is the primary contract and not the stipulation which it may contain for payment of any damages in case of default, as such a stipulation is by way of penalty in case of breach of the original covenant: 9 All. 585, Rel. on. [P 74 C 1]

G. L. Subhedar—for Non-applicant.

Order.—This is a reference by the Collector, Khandwa, under S. 61 of the Stamp Act requesting this Court to revise the order of the Judge, Small Cause Court, Khandwa, levying duty and penalty upon an instrument filed by the non-applicant merely as an agreement even though it came under the definition of a 'bond' as defined in S. 2 (5) (c) of the Stamp Act and a higher duty and penalty than those paid were payable in respect of it.

Notice was issued to the plaintiff-non-applicant to show cause why the order should not be revised. He appeared and showed cause. His learned counsel's contention is that the instrument in question is not a 'bond' but is an 'agreement' within the meaning of Art. 5 of Schedule 1 of the Stamp Act, and that even as an agreement it was exempt from stamp duty, it being an agreement for sale of goods or merchandise exclusively. He relies upon the C. P. Stamp Law Rulings Circular No. 7 of 1887 printed at p. 61 of Part 1, S. 1 of the Stamp Manual in support of this contention. No appearance was made on behalf of the Government.

The instrument as it reads is in the nature of an agreement to deliver (presumably when it comes into existence) a certain quantity of cotton weighing $4\frac{1}{2}$ maunds, namely agricultural produce, or in default to pay its price or money equivalent at the then prevailing market rate, together with didhi, in consideration of a present delivery of a certain quantity of cotton seed weighing $\frac{3}{4}$ ths of a maund of which the rate is stated to be 4 pasaris per rupee. This instrument besides being executed by the obligor is attested by one Gulabchand as a witness. It does not state either the time or the date when the cotton is to be delivered, nor does it state the value payable in default of delivery of the cotton, with any degree of certainty as it is left to

fluctuate according to the then market rate.

The question therefore is whether the instrument under reference is a mere 'agreement' or something more than an 'agreement,' and if it is a mere 'agreement' whether it falls within the exemptions. To bring it under the exemptions it must not only be an agreement for sale of goods or merchandise which includes grain or other agricultural produce as the C. P. Stamp Law Rulings Circulars Nos. 9, 11 and 12 of 1887 show, but must be unattested. Presumably, it is an agreement to deliver certain quantity of cotton and in the event of non-delivery to pay damages. But to be an agreement for sale of goods or merchandise, it must be in consideration of a price paid or promised; but it is not so because cotton is agreed to be delivered in return for cotton seed. It is not therefore, an agreement for sale of goods or merchandise within the meaning of the C. P. Stamp Law Rulings Circulars Nos. 7, 9, 11 and 12 of 1887. It may fairly be styled as an agreement to deliver goods in exchange for goods as held in *Samaratmal Uttamchand v. Govind* (1) and the C. P. Stamp Law Rulings Circular No. 23 of 1902; as such it would not come within the exemptions but would have been liable to a stamp duty as an agreement 'not otherwise provided for.' But for the fact that the instrument is also attested by a witness this case would have been on all fours with the Bombay case. Being attested it falls in the category of instruments referred to in S. 2 (5) (c) of the Stamp Act and is liable to be stamped as a bond under Art. 15 of Schedule 1 of the said Act.

Treating the instrument then as a bond the next question is what duty is payable on it. I think this has to be calculated according to the value of the cotton seed delivered under it, which at the rate of 4 pasaris per rupee comes to Re.1-8-0; and that as such, the only duty payable was 2 annas. The price payable in default of delivery of cotton cannot be taken into account in calculating the stamp duty for reasons given below.

In view of the ruling in *Gisborne and Co. v. Subal Bowri* (2) and the full Bench decision of the Allahabad High

(1) [1901] 25 Bom. 696=3 Bom. L. R. 384.

(2) [1882] 8 Cal. 284=10 C. L. R. 219.

Court *In the matter of Gajraj Singh* (3), I think in estimating the stamp duty payable on an instrument we must look to the primary contract and not take into account the stipulation which it may contain for payment of any damages in case of default, as such a stipulation is by way of penalty in case of breach of the original covenant. A covenant in an agreement to do a particular act, and to compensate its breach in damages, does not convert it into a 'bond' as held in the aforesaid Calcutta case. In calculating the stamp duty payable on this instrument I have, therefore, left out of consideration the covenant to pay the price of cotton in case of breach.

It is, therefore, declared that though the instrument under reference by reason of its being attested by a witness fell within the category of a 'bond' no higher duty and penalty than those already realized by the civil Court were payable, but that on the contrary a duty of 2 annas and a penalty of Rs. 5/- only ought to have been realized.

A copy of this order be sent to the Collector with reference to the provisions of S. 61 (2) and (3) of the Stamp Act.

Reference answered.

(3) [1887] 9 All. 585—(1887) A. W. N. 190.

* A. I. R. 1927 Nagpur 74

HALLIFAX, A. J. C.

Ramangir—Defendant 1—Appellant.

v.

Achheram—Plaintiff—Respondent.

First Appeal No. 109 of 1925, Decided on 15th September 1926, from a decree of the 1st Cl. Sub-J., Bilaspur, D/- 24th June 1925, in Civil Suit No. 13 of 1924.

* *Civil P. C., O. S. R. 6—Set off—Court-fee for excess over plaintiff's claim should be paid if decree for the excess is prayed for—Court Fees Act, Sch. 1, Art. 1.*

When a set-off is pleaded by defendant, Court-fee is payable only on the amount claimed in excess of that claimed by the plaintiff, and only if the defendant wants a decree for that excess: 16 C. P. L. R. 118, *Foll.* [P 75, C 1]

N. G. Bose—for Appellant.

S. C. Dutt Chowdhury—for Respondent.

Judgment.—A great deal of the petition of appeal is irrelevant and the rest is untenable. This is admitted by the learned pleader for the appellant, who urges now only that he ought to be allowed to pay decretal amount in instalments or after a reasonable interval, so as to avoid the loss resulting from a sale of his property by the Court. That is hardly a matter in which interference in appeal would be possible, even if it were not admitted that the appellant has done nothing towards raising the money during the fourteen months that have elapsed since the decree was passed. But anyhow property belonging to him was attached and sold by auction in January last for Rs. 10,000, so that there is nothing more to be said or done about it.

It happens that the property was the same share in a village that the appellant sold to the respondent for Rs. 9,500 in 1922 and that the respondent was the purchaser. The appellant is ordered by the decree to pay costs and interest, so that the net result of his repudiation of the sale of 1922 is that he has now sold the same property to the same person and has got quite Rs. 1,500 less for it, to say nothing of what he may be ordered to pay in the other suit or of what this suit has cost him.

The contention set out in the petition of appeal was mentioned in argument. The plaintiff paid Rs. 6,500 (and a further sum with which we are not concerned in this case) to one Thuluram in satisfaction of a mortgage executed by the defendant. The defendant pleaded that as much as that was not due on the mortgage, as he had not received the full consideration of Rs. 4,000 stated in it. The mortgage was executed on the 23rd of December 1915, for Rs. 4,000 carrying interest at 12 per cent. per annum. Of the consideration the defendant left Rs. 1,380 with the mortgagee as a deposit on which he could draw at will as is recited in the bond.

On these facts the appellant pleads that he received only Rs. 2,620 of the stated consideration of the mortgage. But even if he never withdrew any of the money he left in deposit, it was paid to him before he could deposit it, and it would be still there now for him to draw if he chose. But he distinctly admitted in the lower Court that he drew some amounts against the deposit, and he never

stated that the total of those amounts was not Rs. 1,380; indeed he said nothing about the total.

Another plea similar to this was taken in the lower Court, to the effect that Thuluram the mortgagee was prepared to accept Rs. 4,000 on prompt payment in full satisfaction and the necessity for the payment of the extra Rs. 2,500 was caused by the undue delay of the plaintiff. On this it was held in the lower Court, after a long legal discussion, that the plea was "a counter-claim by way of an equitable set-off," and it could not be heard unless the defendant paid the Court-fee on Rs. 2,500. If the learned Judge had read the judgment in *Sitaram v. Kanhaiyalal* (1) which he cites, he would have learnt what is fairly well known to most Judges and pleaders, that when a set-off is pleaded, Court-fee is payable only on the amount claimed in excess of that claimed by the plaintiff, and only if the defendant wants a decree for that excess.

Anyhow, the plea was not one of set-off at all, though it really does not matter by what name it is called. The case was a perfectly simple one under S. 64 or S. 65 of the Contract Act for the restoration of the benefits the defendant had received under the contract. One of those benefits was said by the plaintiff to be equivalent to Rs. 6,500 and the defendant said it was not worth more than Rs. 4,000. That question ought to have been tried but was not. (The judgment then dealt with some unimportant matters and dismissed the appeal.)

Appeal dismissed.

(1) [1903] 16 C. P. L. R. 118.

A. I. R. 1927 Nagpur 75

HALLIFAX, A. J. C.

Ramcharan and another — Defendants—Appellants.

v.

Sarwar Khan and another—Plaintiffs Respondents.

First Appeal No. 73 of 1925, Decided on 29th March 1926, from the decree of the Sub-J., 1st Class Seoni, D/- 26th March 1925, in Civil Suit No. 9 of 1923.

(a) *Tort*—English Law applies in cases of tort.

The word "tort" does not occur in the law administered in India except in cases of actionable

wrong where the English law applies because no Indian statute covers them. [P. 75, C. 2]

(b) *Evidence Act*, S. 101—*Loss prima facie proved by plaintiff*—Defendant must rebut the evidence.

Where plaintiff has given prima facie evidence of loss of profits caused by defendant, the defendant must prove that the loss was less than that proved by plaintiff: *A. I. R. 1924 Nag. 117, Foll.* [P. 76, C. 1]

V. Bose—for Appellants.

W. R. Puranik—for Respondent No. 1.

Judgment.—The first ground of appeal is that the plaintiff's suit is not maintainable in its present form inasmuch as the claim against the first defendant is based on breach of contract while that against the other two defendants is based on tort. This matter was discussed at some length in the lower Court. The answer is that the word "tort" does not occur in the law administered in India except in cases of actionable wrong where we have to apply the English Law because no Indian Statute covers them. I have never met such a case, and this is certainly not one; both claims are covered by the two parts of the same section of the Contract Act, S. 73.

The suggestion in the petition of appeal, that the contract came to an end eighteen months after it was made and neither party was bound to perform any part of it that was incomplete, has not been mentioned in argument. What is urged for the appellants is that they never broke the contract, that all the trees in the forest of the proper size were duly cut except about fifty which the plaintiffs said were of no use to them, and that the plaintiffs were not prevented from taking away any timber at all, but did in fact take away all that was cut. The evidence that has been held in the lower Court to prove the contrary is so clear and conclusive that it would be a waste of time to discuss it any further.

There remains only the question of the amount of damages. The plaintiffs originally claimed Rs. 6,000 or as much more as might be found due to them, offering to pay the necessary Court-fees on the balance. In the lower Court they were awarded Rs. 3,200 and they have now filed a cross-objection praying that that amount should be increased to Rs. 6,000. Their claim is now definitely limited to that amount. The system on which the amount of damages has been calculated in the lower Court is certainly

a possible system, but some of the necessary factors are absent, and at least one of the factors that are present, (the fact that the plaintiffs paid the defendants Rs. 3,700), has been ignored.

But there is a simpler and more certain system. The defendants retained property belonging to the plaintiffs, consisting of the timber already cut and of the trees of the proper size still standing; and if we can ascertain the value of that property at the time at which the defendant detained it, the whole question is settled very simply. In the deposition of the plaintiff Sarwar Khan taken on the 17th of September 1923 at the first hearing of this case he gave a list of all the cut and uncut timber, as far as he knew, of which he had been deprived, and the prices at which he could have sold it on the spot. Taking the lowest price given by him in each case and omitting all the timber of which he was unable to give details, the value comes to Rs. 6,400.

This statement is corroborated by a considerable body of unimpeachable evidence, and there is nothing at all to rebut it. After that evidence had been given, the only way in which the defendants could avoid a decree for at least Rs. 6,400 was by showing that the loss caused to the plaintiffs by their wrongful act in keeping the timber was less than that amount, as was explained in *Jailal Sao v. Lal Fateh Singh* (1). That they have not even attempted to do, preferring to give a lot of false evidence to show that they were justified on various speciously subtle grounds in doing what they did, some of which proves the plaintiff's loss to have been even greater than Sarwar Khan's estimate.

The defendants' appeal will be dismissed and the plaintiffs' cross-objection will be allowed. The decree of the lower Court will be modified to a decree ordering the defendants to pay to the plaintiffs the sum of six thousand rupees, with interest thereon at 12 per cent. per annum from the 1st of April 1922 till the date of payment, and all the costs incurred by them in both Courts.

Decree modified.

A. I. R. 1927 Nagpur 76

KOTVAL, O. J. C.

Sadashiva and another—Defendants—Appellants.

v.

Mt. Annapurnabai—Plaintiff — Respondent.

Second Appeal No. 81 of 1925, Decided on 28th September 1926, from the decree of the Dist. J., Nagpur, D/- 22nd December 1924, in Civil Appeal No. 150 of 1924.

C. P. Tenancy Act, Sch. 2, Art. 1 — Dispossession—Widow declaring that her adopted son was tenant since adoption—Widow cannot be said to be dispossessed.

Where a Hindu widow having adopted a son alleges that she has in law ceased to be entitled to hold the land, the adopted son having taken her place as tenant, that does not amount to an unqualified abandonment and the cessation of her possession cannot be said to be brought about by any act of dispossession or exclusion within Art. 1. [P 76 C 2; P 77 C 1]

H. S. Gour and W. R. Puranik—for Appellants.

S. B. Gokhale—for Respondent.

Judgment.—The first point argued in this appeal is that the plaintiff having disclaimed or abandoned the tenancy in the previous suit she ceased to be the tenant and could not again be a tenant without a new contract. I am of the opinion that the plaintiff did not abandon the tenancy. She was in possession as a Hindu widow and having adopted a son she alleged that she had in law ceased to be entitled to hold the land since the adopted son had taken her place as tenant. This is all that can be attributed to her. I cannot accept the contention that her words and conduct amounted to an unqualified abandonment. The plaintiff cannot be said to have given out, as it is contended she did, that she did not under any circumstances wish to have any connexion with the land. There was no intention on her part to abandon the land and that the landlord knew this.

The withdrawal of the suit for rent was not really induced by any representation of the plaintiff that she had unqualifiedly abandoned the land. The defendants-appellants were hoping to make capital as they are now trying to do out of the plaintiff's statement.

It is admitted that S. 111 (g) has nothing to do with this case.

(1) A. I. R. 1924 Nag, 117=20 N. L. R. 52.

The last point argued is the one of limitation. It is said that the suit is barred under Art. 1 of the second Schedule, Tenancy Act, 1920. After the adoption of Mahadeo the plaintiff continued in possession as the guardian of Mahadeo. I am not prepared to accede to the contention that the plaintiff as guardian of Mahadeo must be deemed to have excluded herself from possession. Even if a person other than the plaintiff had been the guardian of Mahadeo and the plaintiff had put him in possession on Mahadeo's behalf, her cessation of possession could not have been said to be brought about by any act of dispossession or exclusion. The lower appellate Court has sufficiently discussed this matter in para. 10 of its judgment.

The appeal fails on all points and is dismissed with costs.

Appeal dismissed.

* A. I. R. 1927 Nagpur 77

KINKHEDE, A. J. C.

Harakchand B'atey—Plaintiff—Applicant.

v.

G. I. P. Railway Company—Defendant—Non-applicant.

Civil Revision No. 88-B of 1926, Decided on 30th November 1926, from the decision of the Small Cause Court J., Akola, D/- 1st April 1926, in Civil Suit No. 1217 of 1925.

(a) *Railways Act, S. 77—Overcharge means a charge which the Railway Company is not permitted by law to keep to itself.*

An overcharge is a charge of more than is permitted by law. As such it is not confined to an overcharge recovered before the delivery of the goods to the consignee at destination, but must necessarily cover a case of an overcharge which might be discovered on reweighment, or in other words which the Company is not permitted by law to keep to itself in good conscience whenever recovered. [P 79, C 2]

* (b) *Railways Act, S. 55—Reweighment of goods must be allowed—Company is liable for damages caused by failure to allow reweighment.*

The obligation or liability to refund an overcharge, and power to levy undercharge, involves the necessary liability or right to reweigh the goods for the due enforcement of the principal obligation or right as between the parties to any contract of consignment. [P 79, C 2; 80, C 1]

As a right to reweigh goods is an accessory to the substantive right of the Company to calculate an undercharge, the same is the case with the

right of a party entitled to refund of an overcharge, and therefore the Company is liable to the consignee in damages for not giving him the necessary facilities to reweigh the goods, both from the point of view of the contract express or implied, as also of the Indian Railways Act: 13 A. L. J. 417, Rel. on. 22 C. W. N. 310; 22 C. W. N. 902 and 16 C. W. N. 356, *Diss. from*.

[P 80, C 1]

* (c) *Railways Act, S. 72—Risk-note A—Failure to reweigh goods after their arrival at destination amounts to misconduct.*

Failure of the Company to reweigh the goods after their arrival at destination is a default which amounts to misconduct on the part of the Railway Company's servants within the meaning of the contract as embodied in Risk-note Form A. [P 80, C 2]

(d) *Provincial Small Cause Courts Act, S. 25—High Court will not interfere unless findings are based on misinterpretation of evidence.*

A Court of revision is reluctant to interfere with the findings of the Small Cause Court unless they are based on misinterpretation of evidence, and decide the case for itself on the material on record: 19 N. L. R. 72, *Foll.*

G. G. Hatwalne—for applicant.

K. K. Gandhe—for Non-Applicant.

Order.—The firm of Velsi Karsonji of Bombay consigned to the plaintiff's firm known as Harakchand Hemchand of Akola 12 bags of wet betel-nuts known as Calcutta supari from Wadi Bunder on 24-2-25 under a to-pay consignment note (Exhibit D-1) accompanied by a risk-note in form A. Exhibit D-1 shows the weight as 23 maunds and Rs. 28-6 as the amount of freight. It reached Akola on 2-3-25. The consignee received a bijak (Exhibit P-13) from the Bombay firm which showed the weight of the twelve packages to be less than 23 maunds. Plaintiff's son Mohanlal (P. W. 1) went to the Akola railway station to take delivery on the 2nd March 1925; in view of the discrepancy he naturally requested the Goods Clerk to reweigh the goods before effecting delivery, but the latter declined to comply with the request. The consignee refused to surrender the railway receipt and take delivery. The question therefore is whether the Railway Company's servants were under any legal liability to reweigh the consignment and to allow or make any note in the railway book about the same. Each party blames the other as being in the wrong. The goods thus remained in the custody of the Railway Company from 2-3-25 until 3-4-25 when the delivery was given as per Exhibit P-9, whereon P. W. 1 made the following endorsement.

Bags received intact reweighed maunds 15 seers 10 only against Invoice 23 maunds on 3-4-25.

Mohanlal,
for Harakchand Hemchand.

During this interval the goods deteriorated. Plaintiff therefore sues the Company for Rs. 403 on account of damages.

During the interval between 2-3-25 and 3-4-25 a lot of correspondence passed between the parties. Suffice it to say at this stage that until the Station Master, Akola, was ordered by the Divisional Traffic Manager, Nagpur,

to effect delivery of the bags by allowing reweighment,

as stated in his letter dated 27-3-25 (Exhibit P-6) the Company was not willing to reweigh the goods. Accordingly after some more correspondence (Exhibits D-6, P 8 and P-7) the Station Master gave delivery after reweighment as we find from Exhibit P-9 above referred to.

The main question for trial was whether the plaintiff or the defendant was in the right. The Judge of the Small Cause Court, Akola, thinking the plaintiff to be in the wrong in refusing to take delivery on 2-3-25, and that Risk Note A exonerated the Company from liability, dismissed the suit. He, however, found that some damage was suffered and the goods had deteriorated; but held that plaintiff's refusal was wrongful and as there was no sufficient evidence to base any estimate of the damage he left it unestimated. In depriving the Company of its costs he however observed that the Company had invited this suit by non-compliance with the plaintiff's simple request for reweighment and taking a note of the result in a delivery book or elsewhere which,

could and should have been done without any trouble to the defendant's servants at Akola.

The defendant is apparently satisfied with this order as to costs; but the plaintiff who is aggrieved by the decision has applied in revision against it.

I think the decision of the Small Cause Court Judge cannot be accepted as being in accordance with law. The Judge does not appear to have duly considered the several letters which passed between the parties in connexion with the question at issue. A perusal thereof discloses that the plaintiff at once addressed a letter dated 2-3-25 (Exhibit D-7—P 1) to the Station Master, Akola,

asking him to give a quick delivery on weighing the goods as he thought that there was some mistake in mentioning the weight of R/R in the consignment and giving him strictly to understand that he will hold him responsible for delaying the delivery. The Station Master ordered the Goods Clerk to 'do the needful' as one can see from the endorsement in green ink under that date on that exhibit, but he did not care to see that his order was actually carried out. (Then after considering the correspondence the judgment proceeded). After serving notices of suit dated 4-4-25 (Exhibit D-4=P-10) on the Agent of the Company who got it on 6-4-25 (Exhibit P-11) but gave no reply to it, the present suit was instituted on 6-5-25 for the recovery of Rs. 403-14-9. During the pendency of the suit the Company sent a memo (Exhibit P-12) dated 9-6-25 to plaintiff offering to refund the overcharge of Rs. 9-9, but plaintiff could not accept it at that date in view of the suit.

The correspondence clearly shows that while plaintiff was anxious to expedite the delivery of the goods to him on reweighment, the Company and its servants were taking matters very coolly and gave no prompt attention to his repeated demands. I cannot help remarking that what the Station Master did on 3-4-25 viz., reweigh the goods in pursuance of the Divisional Traffic Manager's aforesaid order could and should have been done or caused to be done by him with a little exercise of his prudence on 2-3-25 and had he cared to see that his order to "do the needful" endorsed on Exhibit D-7 was carried out, he would have saved the parties from all the bother of this litigation. Even if the Station Master had taken care to do this 'without prejudice' as item No. 9 on Exhibit P-7 dated 1-4-25 shows it would have served the plaintiff's purpose and also safeguarded the Company's interest and he would have been in a position to detect and report to the Goods Superintendent that there was an overcharge in respect of the consignment.

Had the Judge the patience to read through the correspondence, he would not have failed to notice a very important disclosure relevant to the case, made by the marginal note on Exhibit D-4

which would have convinced him that the liability of the Company to reweigh the goods was all the greater in this than in other cases. To refuse to reweigh goods and to ask the consignee to take delivery without reweighing or verifying the weight was, under the above circumstances, nothing short of a demand by the Railway Company for an excess freight or a charge of more than what was permitted by law and for a complete and unconditional discharge from plaintiff in respect of booked weight while actually delivering short weight. As the actual reweighment made on 3-4-25 has clearly proved that the goods only weighed 15 maunds and 10 seers, there was clearly an overcharge for 7 maunds and 30 seers and in spite of it the Company actually realized Rs. 29-6 charged at Wadi Bunder for the goods booked.

The marginal endorsement dated 11th April 1925 on Exhibit D-4 showed that this was one of the several 'cases of incorrect weight from Wadi Bunder.' The defendant Company ought to realize and take early steps if they have not yet taken them to see that in keeping a defective weighing machine which when anything is weighed by it showed the weight more than what it really weighed renders it liable to conviction for possessing a weighing machine which on examination is found to be incorrect or otherwise unjust. It may if it likes charge for the use of weighing machines but can have no justification to refuse reweighing goods if as the result of possessing defective weighing machines it realized excess freight not permitted by law.

In the matter of the administration of the law relating to railways, the law vests any amount of discretion in the railway administration and its staff. One cannot expect every contingency to be exhaustively provided for in a legislative enactment, and there is always scope for the exercise of discretion on the part of the officers whose duty it is to carry out the provisions of law. In short prudence and discretion play a very important part in the administration of justice, and much more so in the several departments of the Railway Administration which has often to deal with the commercial world or, if I may say so, is a necessary concomitant of commercial

activities. But for the facilities to the constituents and in particular to the merchants as a class, which the Railway Administration shows, the trade would have been at its lowest ebb. It may sometimes happen that what is not strictly one's legal obligations may be the dictates of expediency which plays a very important part in the administration of the affairs of a Railway Company which owes so much to the commercial world.

If the underlying principle of the several provisions of the Railways Act is carefully examined, it will be seen that it is to afford every facility to trade and intercommunication between several parts of the world rather than hamper it. A provision for a refund of overcharge enacted in S. 77 of the Indian Railways Act is an instance in kind. It no doubt lays down certain limitations subject to which the liability of Railway Company to refund overcharge to the person entitled to claim it, is enforceable; these provisions must be regarded not by way of negation of a constituent's right to a refund of an overcharge, but as a positive recognition of that right in cases where the conditions are fulfilled. An overcharge, as we all know, is a charge of more than is permitted by law. As such it is not confined to an overcharge recovered before the delivery of the goods to the consignee at destination, but must necessarily cover a case of an overcharge which might be discovered on reweighment, or, in other words, which the Company is not permitted by law to keep to itself in good conscience whenever recovered.

Section 54 of the Indian Railways Act gives the Railway Administration a power to impose conditions not inconsistent with the Act or with any general rules thereunder with respect to the receiving, forwarding or delivering of any animals or goods. S. 55 thereof gives it a lien on the goods for any rate, terminals or other charge due to it so as to entitle it to detain the whole or any of the goods for enforcing such payments and even to sell the same for their recovery. This obligation or liability to refund an overcharge, and power to levy undercharge, by necessary implication involves the necessary liability or right to reweigh the goods for the due enforcement of the principal obligation or right as

between the parties to any contract of consignment. In short the Railway Company is entitled to reweigh the consignment and collect the excess charge for the excess weight at the destination and to detain and sell the goods, if the undercharge is not paid, and credit the sale proceeds towards the undercharge and demurrage if then due by the defaulter. As a necessary counterpart of such right of the Company is the right of the consignor or consignee to claim a refund of any overcharge recovered from him, as expressly provided for in S. 77 of the Act. As in the case of determining and collecting an undercharge, so, in the case of refunding an overcharge, a right to remeasurement, reweighment and recalculation must necessarily be implied. If a right to reweigh goods is, as I hold, an accessory to the substantive right of the Company to calculate an undercharge, same is the case with the right of a party entitled to a refund of an overcharge. It necessarily follows that if a consignee has prima facie good reasons to think, before he is actually called upon to surrender his railway receipt and to pay the overcharge, that an incorrect weight has been entered in the consignment, and that he must have it ascertained to the knowledge of the Company, I do not see any justification on the part of the Company or its servants to shut its eyes to the actual facts and to say that it is being subjected to the performance of an obligation outside the scope of his contract with it or the provisions of the Indian Railways Act, to be called upon to reweigh the goods before delivery.

The Railway Company has in its custody the railway receipt surrendered by plaintiff, but the same has not been produced as an exhibit in the case. In all probability it has printed on its back several conditions subject to which the consignment was accepted, and I think it will not be too much to presume that there is a condition which reserves the Railway Company's right of remeasurement, reweighment and recalculation of the goods and charge rate, terminals or other charge due to it at the place of the destination as contemplated by Ss. 54 and 55 of the Act. This reservation necessarily involved a reciprocal reservation in favour of the consignor and consignee of the latter's right of similar

remeasurement, reweighment and recalculation of the goods, and could not have given the Company the power to refuse such remeasurement, reweighment and recalculation of the goods at the place of destination and thus alter or depart from its contract either express or implied. The cases of *Chunnilal v. The Nizam's Guaranteed State Railway Co., Ltd.*, (1) and *B. B. & C. I. Ry. Co. v. Budh Sen-Susp Chand* (2) are instructive in a way in connexion with this question of remeasurement, reweighment and recalculation.

Exhibit D-1 and the risk-note in Form A, attached to it, held the Company harmless and free from all responsibility for the condition in which the aforesaid goods may be delivered at destination and for any loss arising from the same except upon proof that such loss arose from misconduct on the part of the Railway Company's servants. The conditions on the back of Form A made it impossible for the plaintiff to hold the Company liable to pay in case of damage, leakage or wastage occurred in transit owing to goods not being securely packed. It appears from the evidence of P. W. 1 that the goods were in good condition when they arrived at Akola. It is not also the plaintiff's case that any portion of the goods booked were pilfered or stolen or that there was any damage, leakage or wastage while in transit by reason of the bags not being securely packed. The loss due to deterioration was in consequence of the delay in delivering the goods after their arrival at destination which in its turn was due to the failure of the Company to reweigh the goods. This failure was a default which amounted to misconduct on the part of the Railway Company's servants within the meaning of the contract above referred to as embodied in the Risk-note Form A.

In connexion with the points involved in this case it may be remarked that the case of *Rohilkhand and Kumaon Ry. v. Isamil Khan* (3), is very instructive. There the right of the consignee of goods similarly covered by risk-note in form A 'to have the goods reweighed then and there before he surrendered the railway

(1) [1907] 29 All. 228=(1907) A. W. N. 21=A. L. J. 80.

(2) A. L. R. 1924 All. 180=46 All. 55.

(3) [1915] 13 A. L. J. 417=29 I. C. 207.

receipt' was confirmed. It was also held that when this had been done

he was entitled to endorse on the back of the railway receipt a statement that he accepted delivery of the consignment as it stood, while taking note of the fact that its actual weight was only so much and not the full weight as given in the railway receipt itself

and that

..... the Station Master or other local officials of the Railway Company at the delivery station were bound to offer to the consignee reasonable facilities for weighing the goods on the spot.

As pointed out above the defendant Railway Company did not offer reasonable facilities to the plaintiff consignee; on the contrary, it called upon him as per letter Exhibit P-3 to take delivery, and surrender railway receipt in token of the release of all claim for damages to which he may be entitled by reason of the failure of the Company to reweigh the goods and the delay caused thereby and the necessary consequential deterioration of the goods, and even threatened to exercise its rights under S. 55 of the Act. I have absolutely no doubt that the attitude taken up by the Company at the stage of the correspondence, as also at the stage of the pleadings, and no less in its arguments before this Court, was one intended to make this a test case on the question of the Company's legal obligation to reweigh the goods. I must say that there was a clear misapprehension of its legal duty and obligation on the part of the Railway Administration and its servants. The great delay which has taken place before the Company decided to give delivery on reweighment is solely attributable to this misapprehension. The Company's learned pleader who argued the case before me drew my attention to the following cases: *Ramjash Agarwalla v. India General Navigation and Railway Co. Ltd.* (4); *Jaganath Marwari v. East Indian Railway Co.* (5) and *Janki Das v. The Bengal Nagpur Railway Co.* (6); as supporting his contention that there was no legal obligation to reweigh or to certify a shortage, and that a refusal of the Company to reweigh did not entitle the consignee to refuse to take delivery. I have gone through those cases and I am of opinion that

every one of them is distinguishable from the facts of the present case.

The report of the case of *Janki Das v. The Bengal Nagpur Railway Co.* (6) does not show that the question of the Company's liability to reweigh the goods was expressly decided in its favour. In *Ramjash Agarwalla v. India General Navigation and Railway Co., Ltd.* (4) it was pointed out that a practice prevailed in that Company to allow inspection and reweighment, but that the consignee did not avail himself of it, and granted a clear receipt. He did not even weigh them himself. It was remarked that the matters were made easy for the consignee in a suit if reweighment is made by the Company before removal of the goods by the consignee. But that it was a matter of evidence only and the refusal of the Company to reweigh did not in any way affect the consignee's right, who might weigh the goods himself and claim the price of the shortage in weight. It was further remarked that whether the consignee was entitled to refuse to take delivery in case of short delivery, or the broad proposition that the consignee is not entitled to have goods, entrusted to a common carrier, reweighed *need not be considered in the present case*. This case is, therefore, no authority for the proposition for which it is cited as the words in italics show.

In *Jaganath Marwari v. East Indian Railway Co.* (5) the consignee looking to the torn condition of the bags suspected a shortage and, therefore, demanded reweighment not on the Company's weighbridge but on his own scale and insisted upon a certificate of shortage. It was observed by the learned Judges that no authority was cited to them by the plaintiff showing that the Railway Company were under a liability to reweigh the goods or to give a certificate of shortage; and thinking that the previous cases in *Janki Das v. The B. N. Ry. Co.* (6) and *Ramjas Agarwalla v. Indian General Navigation and Railway Company* (4) were authorities in favour of the Company's non-liability to reweigh, they proceeded to hold that the Company was not liable. With due respect to the Judges who decided these cases I am constrained to say that the view taken in them is opposed not merely to the provisions of the Railways Act, but also to the

(4) [1917] 22 C. W. N. 310=41 I. C. 387.

(5) [1917] 22 C. W. N. 902=45 I. C. 933.

(6) [1912] 16 C. W. N. 356=13 I. C. 509=15 C. L. J. 211.

very spirit underlying them. I therefore prefer the view taken by the Allahabad High Court in *Rohilkhand and Kumaon Railway v. Ismail Khan* (3) and hold that the defendant Company is liable to the plaintiff in damages for not giving him the necessary facilities to reweigh the goods.

From the point of view of fact as well as of law it would thus be clearly seen that the Railway Company had placed itself under an obligation to reweigh the goods at the request of the consignee. I may add that the word 'obligation' includes every duty enforceable by law as defined in the Specific Relief Act. It is a tie or bond which constrains a person to do or suffer something. It implies a right in another person to which it is correlated, and it restricts the freedom of the obligee with reference to definite acts and forbearances. Indian Legislature has used the term in its wider juristic sense which is limited to duties arising either ex contractu or ex delicto. In short, the word 'obligation' is intended to be enumerative and not exhaustive. The failure to reweigh the goods thus amounts to misconduct on the part of the Company's servants and make the Company liable both from the point of view of the contract, express or implied, as also of the Indian Railways Act.

I am not consequently prepared to uphold the decision of the Court below exonerating the Company from liability. Neither the Company's refusal to reweigh was proper, nor did the risknote afford any protection to it from such liability, especially as it is found as a fact by the Court below that the goods were in a deteriorated condition on the day of their delivery. This deterioration having been fully established by the evidence adduced in the case as the direct and natural consequence of the wrongful withholding of delivery of goods unless taken without reweighment, made the Company liable in damages to the plaintiff. The Small Cause Court Judge unnecessarily suspected the evidence of plaintiff and his Witnesses Nos. 1 and 2 as having been given in concert to make out an exaggerated claim against the defendant. He failed to see that plaintiff rightly chose the Akola station itself as the proper place for the sale of the damaged goods, as it could practically bring the knowledge of the actual sale

proceeds home to the station staff then and there.

If the Judge had cared to examine the details of the claim for damages as given by P. W. 1 in his deposition he would have found that : (i) Rs. 388-12-9 represented the debit to him by the Bombay firm on account of the value of betel-nuts exclusive of bardana and other charges, Exhibit P-13 ; (ii) Rs. 10-1-9 was the cost of bardana and other charges ; (iii) Rs. 28-6-0 paid as railway freight to the Company ; (iv) Re. 1 paid on account of coolie charges ; and (v) Rs. 36 was charged by him on account of profits on the 12 bags : total Rs. 494-4-6. Deducting from this the amount which he actually realized Rs. 65-7-3, proved by P. W. 1, P. W. 2 and Exhibit P-14, a round sum of about Rs. 400 represented the actual loss sustained by the plaintiff. I cannot make out what difficulty the Judge could have experienced in assessing this damage. I fail to see how the Judge observes that it is not possible to estimate damage properly for want of sufficient evidence. If there was any objectionable item it was the fifth one of Rs. 36 on account of profits. But even assuming that very small margin of Rs. 3 per bag, which plaintiff claimed, was not allowable the claim could well have been decreed to the extent of the balance. I do not see my way to deprive plaintiff of that small margin. I therefore hold the plaintiff's claim as proved to the extent of Rs. 400.

I cannot help remarking that a Judge of a Small Cause Court fills a very important position of responsibility and owes a duty to the litigant world to dispose of cases in a proper and judicial manner, disclosing proper appreciation of evidence much of which is heard rather than recorded by him. It is on this account that a Court of revision is reluctant to interfere with his findings unless they are based on misinterpretation of evidence as pointed out by this Court in *Padamsi v. Sheshrao* (7). The Judge of the Court below having failed to properly appreciate the evidence or give sufficient attention to the several matters apparent from the record this Court has no alternative but to ignore his findings and decide the case for itself on the material on record. If, as I understand it, the case was fought out by the Com-

(7) A. I. R. 1923 Nag. 292=19 N. L. R. 72.

pany as a test case, I dare say it ought to have received much greater attention at the hands of the Judge than he has actually given to it.

I therefore reverse the lower Court's decision and pass a decree for Rs. 400 against the defendant-non-applicant; as regards costs I direct that plaintiff's costs of both the Courts shall be paid by the defendant Company who will bear its own.

As by his notice dated 5-3-25 (Exhibit D-2) plaintiff notified to the Company that it will be held responsible for loss of interest, and as the plaintiff has claimed future interest at a moderate rate of Re. 1 per cent. per mensem, from the date of the suit, I think this is a fit case for awarding such interest. I accordingly direct that the decree shall carry future interest from such date (6-5-25) until satisfaction. Pleader's fee will be Rs. 40 for this Court and Rs. 25 for the Court below.

Revision allowed.

* A. I. R. 1927 Nagpur 83

KINKHEDE, A. J. C.

Venkatrao—Plaintiff—Appellant.

v.

Ganpat and others—Defendants—Respondents.

Second Appeal No. 152-B of 1923, Decided on 21st October 1926, from the Decision of the Dist. J., Amravati, D-31st January 1923, in Civil Appeal No. 101 of 1922.

* *Evidence Act, S. 91—Mortgage—First mortgage renewed by second mortgage—Second mortgage invalid for want of proper attestation—Mortgagee can fall back on first mortgage—Contract Act, S. 62.*

Where an earlier mortgage is substituted by a subsequent mortgage but the subsequent mortgage is invalid for want of legal attestation, the mortgagee can fall back on the earlier mortgage as there is no valid substitution of the old security by the new one, provided his rights under the earlier mortgage are not otherwise barred; 6 N. L. R. 164 and 39 All. 178 (P. C.), Rel. on. [P 84, C 1]

* (b) *Civil P. C., S. 11—Subsequent mortgage substituted for earlier mortgage—Suit on subsequent mortgage failing on the ground of invalidity of the mortgage for want of legal attestation and mortgagee not falling on prior mortgage—Second suit on prior mortgage is not barred—Civil P. C., O. 2, R. 2.*

Where a subsequent mortgage is substituted for a prior mortgage and the mortgagee sues on

the subsequent mortgage, but the subsequent mortgage is held to be invalid for want of legal attestation, mortgagee's failure to fall back on the prior mortgage in the same suit does not bar a second suit on the prior mortgage if he was ignorant of the defect in the second mortgage at the institution of the first suit. [P 84, C 2]

R. R. Jaiwant—for Appellant.

K. K. Gandhe, S. K. Ghosh and D. T. Mangalmurti—for Respondents.

Judgment.—This second appeal raises two questions: whether the plaintiff can fall back on the earlier mortgage of 11-4-1904 after having failed in his suit based upon a later mortgage dated 27-2-1912 on the ground that it was not duly attested; and (2) whether the decision in the former suit that he cannot fall back on the prior mortgage operates as *res judicata* in the present suit.

The first Court held that the plaintiff was not entitled to fall back as there was a complete substitution of the old mortgage by a new one. It did not decide the question of *res judicata*. The plaintiff appealed to the District Judge who held that not only was there a substitution of the old contract by a new one and therefore plaintiff could not fall back upon the earlier mortgage, but that the finding in the previous suit operated as *res judicata* and barred the present suit. The correctness of the decision on both these points is challenged before me by the plaintiff. I will deal with these points one after the other.

A reference to the decision given in the former suit on the mortgage dated 27th February 1912 shows that the former suit failed on the ground that no mortgage valid in law had come into existence. The suit was therefore dismissed as not maintainable on the basis of such invalid mortgage. That decision was upheld in appeal. The decision so far as it went became final between the parties and was not liable to challenge in a subsequent suit.

The effect of that decision was to declare that the new mortgage dated 27th February 1912 which was substituted by act of parties for the earlier mortgages dated 11 April 1904 was no substitution at all in the eye of the law. The old security therefore was not wiped out of existence even though the parties attempted to wipe it out, and in fact believed that it had been wiped out. If the newly substituted contract required for its validity proper attestation, and such

attestation, was not secured, there was no valid substitution of the old security by the new one. The relation between the parties therefore continued to be governed by the terms of the earlier mortgage and could not be said to have been governed by the later mortgage. The case is well within the principle of the Privy Council decision in *Chandi Lal v. Sheoraj Singh* (1). S. 62 of the Contract Act also supports this view. A case in *Dhirajsingh v. Rajaram* (2) is also in point. There a lease of land described as absolute occupancy land was really occupancy and the mortgage in lieu of which that lease was given was held to have been revived. I am of opinion that by reason of the later security having proved to be invalid there was and could be no substitution of the earlier security, and consequently plaintiff could fall back upon his earlier mortgage, provided his rights were not in any way barred by res judicata or by limitation. That they were not so barred by limitation is found by the lower appellate Court and that finding is not questioned by me.

The next question is whether this suit is barred by res judicata either actual or constructive. Paragraph 6 of the trial Court's judgment in the former case clearly shows that this point was left undecided for want of proper material. Thus there was no decision on the point, or I may say that the Judge refrained from deciding that point. The plaintiff no doubt inserted specific Ground No. 3 in his memorandum of appeal to the District Judge on that point. A perusal of paragraph 3 of the District Judge's judgment, however, makes it clear that the ground was abandoned at the hearing. The necessity to decide that point was thus dispensed with. In spite of that the learned District Judge observed that the plaintiff could not fall back upon his prior mortgage. This was nothing but an obiter remark wholly uncalled for and unnecessary for the proper decision of the case. It cannot therefore operate as res judicata, for the simple reason that it was not a decision material for the proper determination of that suit.

It is argued on behalf of the respondents that at any rate there is a bar of

constructive res judicata under Explanation 4 to S. 11, Civil Procedure Code. I do not think this is a contention which can be upheld. In my opinion, on the view then taken by the plaintiff of the facts known to him to constitute his cause of action furnished by the later mortgage of 1912, it could not be said that he ought to have fallen back upon the earlier mortgage, although he might have done so if he had then known the defect. The cause of action on the earlier mortgage was distinct, and it is only as the result of the decision in the former suit that the mortgage of 1912 afforded no cause of action, that the plaintiff became relegated to his rights under the earlier mortgage and entitled to enforce them by a subsequent suit.

To my mind the real test is whether if at the date of the former suit on the later mortgage plaintiff had discovered the flaw in his title as mortgagee under that mortgage; and, falling back upon the earlier mortgage, framed his suit as one based on the later mortgage in the first instance, and in the alternative, on the earlier mortgage, in case it (later mortgage) were held invalid and inoperative, the defence of the mortgagor that such a suit cannot lie would have prevailed. I am of opinion that there was nothing to prevent the plaintiff from framing his former suit in the alternative; but, at the same time, there was nothing in law to compel him to do so if the defect was not then known to him. In other words, although he might have chosen at the stage of argument to fall back on the earlier mortgage it could not be legally said that he ought to have done so at the time of filing the suit. The present suit is therefore not barred by res judicata either actual or constructive.

As the amount due under the mortgage has not been determined by the lower appellate Court a remand is inevitable. The appeal is allowed and the case is remanded for decision according to law with advertence to the above remarks, after determination of such of the points as have been left undetermined. Costs of this appeal will be borne by the respondents.

Appeal allowed.

(1) [1917] 39 All. 178=39 I. C. 343=44 I. A. 60 (P. C.).

(2) [1910] 6 N. L. R. 164=8 I. C. 1125.

A. I. R. 1927 Nagpur 85

PRIDEAUX, A. J. C.

Hardeo—Plaintiff—Appellant.

v.

Ramchandra—Defendant—Respondent.

Second Appeal No. 177-B of 1925, Decided on 27th September 1926, from the decision of the 1st Addl. Dist. J., Akola, D/- 23rd February 1925, in Civil Appeal No. 186 of 1924.

Damages—Suit for—Obstruction from taking water from well is continuing injury—Where damage consequent on an act is actionable rather than the act itself, every damage is actionable.

A cause of action, in respect of which a plaintiff is entitled to have the prospective damages assessed is distinct from a continuing cause of action, that is to say, a cause of action which arises from the repetition or continuance of acts or omissions of the same kind as that from which the action has been brought. Similarly, where the damage consequent on an act or omission rather than the act or omission itself is actionable, then, as the action is only maintainable in respect of the damage, or is not maintainable until the damage is sustained, an action will lie every time damage accrues from the act; 11 A.C. 127, *Ref.* [P 86, C 1]

The obstruction from taking water from a well is a continuing injury; 6 *Mad.* 176 and 28 *Mad.* 72, *Rel. on.* [P 86, C 1]

V. Bose and *P. N. Rudra*—for Appellant.

M. B. Niyogi—for Respondent.

Judgment.—The parties to this litigation are brothers. In December 1917 there was a partition between them, and at that partition S. No. 53 of mouza Pardi Asra came to the share of Hardeo, and an adjoining field, S. No. 52 of the same village, went to Ramchandra. In S. No. 53 there was a garden of orange, mango, guava and lime trees. In S. No. 52 there was a well from which this garden was watered. At the partition there was an agreement between the parties that Hardeo had a right to get his trees watered from the well in S. No. 52. But as in 1918 the defendant obstructed the plaintiff from getting water from the well the latter filed a suit and got an injunction against the defendant by which the defendant was directed to allow the plaintiff to take water from the well for watering the old trees in field S. No. 53. The decree in that case was passed on the 28th February 1920. The parties came up to this Court in Second Appeal. The present

suit is by Hardeo for damages caused to his trees by want of water. His case is that his orange, mango, guava and lime trees had dried up in consequence of the defendant's obstruction to the plaintiff from getting water from the well. He filed two suits for damages: the first suit No. 56 of 1922 in the Court of the Sub-Judge, Basim, was filed on the 15th March 1922 for damages owing to the orange trees having dried up about the 1st of April 1920, in which he claimed Rs. 2,000; and the second was filed three days after the filing of the first, Suit No. 58 of 1922 in the same Court, for damages owing to the other trees, viz., mango, guava and lime trees, having dried up about May 1921, amounting to Rs. 1,100. The two suits were heard together, and the first Court consolidated and treated both as one claim and passed a single decree in which he gave the plaintiff Rs. 1,000 as damages. The Court held that the fact of obstruction in 1918 was *res judicata* by reason of the decision in the previous suit for injunction; that the obstruction continued up to October 1921; and that the cause of action was a continuing one, the claim not being barred by limitation.

On appeal the lower appeal Court finds that the suits were rightly consolidated, that the first Court had power to try the consolidated suits, and that the suits could be brought. As regards the question of limitation, the learned Judge of the lower appellate Court finds that the case is a simple case of breach of contract and falls under Article 115 of the Limitation Act, limitation commencing from the date of the breach complained of in 1918, and that the suit was therefore barred by limitation having been brought in 1922. The Judge further held that the defendant was not liable for the value of the trees and found that the damages claimed are not direct and natural and should not be allowed. As to the extent of the damage the lower appellate Court agreed with the opinion of the first Court.

Now, it seems to me that the lower appellate Court has gone radically wrong. Its decision is in fact this: In 1918 there was a breach of contract. The damage now complained of had not then accrued, but because the present plaintiff had not, in his suit for injunction, anticipated damages he is barred now

from getting compensation for causes of action that happened subsequent to the filing of the former suit. It seems to me that this finding is neither common-sense nor good law. How could the plaintiff in 1918 complain of the damages caused in 1920-21, and how could he sue for damages when the cause of action had not accrued? I have no doubt that this is a case of continuing cause of action. As Lord Halsbury says in Volume 10 of his Laws of England, page 310:

A cause of action in respect of which a plaintiff is entitled to have the prospective damages assessed must be distinguished from a continuing cause of action, that is to say, a cause of action which arises from the repetition or continuance of acts or omissions of the same kind as that from which the action has been brought. Similarly, where the damage consequent on an act or omission rather than the act or omission itself, is actionable, then, as the action is only maintainable in respect of the damage, or is not maintainable until the damage is sustained, an action will lie every time damage accrues from the act.

In the case of *Darley Main Colliery Co. v. Mitchell* (1) the lessees of coal under the respondent's land worked the coal so as to cause a subsidence of the land and injury to houses thereon in 1868. For the injury thus caused the lessees made compensation. They worked no more, but in 1882 a further subsidence took place causing further injury. There would have been no further subsidence if an adjoining owner had not worked his coal, or if the lessees had left enough support under the respondent's land. And in that case it was held that the cause of action in respect of the further subsidence did not arise till that subsidence occurred, and that the respondent could maintain an action for the injury thereby caused.

The same principle has been affirmed in Indian cases: see *Dwarka Nath Gupta v. The Corporation of Calcutta* (2). The obstruction from taking water from the well seems to me a continuing injury: see *Narasimma v. Ragupathi* (3) and *Sankaravadivelu Pillai v. Secretary of State* (4).

I agree with the Courts below as to the amount of damages, and think that as the plaintiff's suits are within time, the damages assessed should be allowed.

(1) [1886] 11 A. C. 127=55 L. J., Q.B. 529=54 L. T. 882=51 P. J. 148.

(2) [1891] 18 Cal. 91.

(3) [1883] 6 Mad. 176.

(4) [1905] 28 Mad. 72=15 M. L. J. 32.

I therefore set aside the decree of the lower appellate Court and restore that of the first Court. The respondent will pay the plaintiff-appellant's costs here and in the two lower Courts.

Appeal allowed.

* A. I. R. 927 Nagpur 86

MITCHELL, A. J. C.

Ganpat—Defendant 4—Appellant,

v.

Budhmal and others—(Plaintiffs 1—3) and Defendants 1-3 and 5-11—Respondents.

Second Appeal No. 225-B of 1925, Decided on 11th October 1926, from the decree of the Dist. J., Amraoti, D/- 7th April 1925, in Civil Appeal No. 116 of 1924.

*(a) *Transfer of Property Act, S. 41—Payment redeeming a mortgage amounts to transfer.*

The payment redeeming a mortgage, and thereby extinguishing the rights transferred by the mortgage, is a transfer within S. 41 inasmuch as the rights created by the mortgage in favour of the mortgagee are transferred to the mortgagor. [P 88, C 1]

(b) *Hindu Law—Inheritance—Berar—Daughter-in-law inherits in preference to paternal cousins.*

In Berar a daughter-in-law can inherit and she has been held to inherit in preference to paternal cousins of her own husband; 4 Bom. 219, *Foll.* [P 87, C 2]

N. G. Bose—for Appellant.

S. B. Gokhale and V. N. Herlekar—for Respondents.

Judgment.—The suit is based on a mortgage executed on June 2, 1909, by the defendant Abhiman and his two brothers in favour of one Kasturchand. Abhiman's family have parted with all interest in the property and the present members, Defendants Nos. 1 to 3, are merely pro forma parties. The mortgage property consisted of fields bearing Nos. 54 and 70, and a house. On 20th May 1912, the original mortgagors sold field No. 54 to Ganpat, who is Defendant No. 4 in the suit, and appellant in both appellate Courts. He pleads that the mortgagors redeemed the whole mortgage from the price he paid for Field No. 54 and he is the chief contesting party against the plaintiffs. The other parties are subsequent transferees, whose position need not be considered in this suit.

The plaintiffs are the heirs of the original mortgagee Kasturchand, being his paternal cousins. When Kasturchand died on 11th March 1911, his estate was in the possession of Mt. Zunkari, the widow of Kasturchand's pre-deceased only son Depchand. She was in full possession of the property when Abhiman and his brothers, the original mortgagors, sold Field No. 54 to Ganpat, and on the day of the sale, 20th May 1912, the amount due on the mortgage, Rs. 2,400, was duly paid over to Mt. Zunkari, in the presence of the officer who registered the sale-deed.

In January 1913 the plaintiffs sued Mt. Zunkari for possession of Kasturchand's estate, and on 15th May 1914, they obtained a decree giving them possession of all the immovable property and directing Mt. Zunkari to pay to them the Rs. 5,000 which she admitted she held as cash and moveables belonging to the estate. The mortgage now in suit was not mentioned during that litigation. The plaintiffs pleaded they were not in possession of particulars of mortgages when they filed the suit. They denied the payment to Mt. Zunkari and pleaded that in any case the payment was made to a person who could not give a valid discharge, and, therefore, did not extinguish the mortgage which they have inherited.

According to the terms of the mortgage the principal amount of Rs. 1,500 was repayable in five instalments of Rs. 300 beginning on 15th January 1910, and the whole amount was to become payable on default of two instalments. As the plaintiffs plead that no payment was made, their cause of action arose on 16th January 1911. They filed the present suit on 15th January 1923 the last available date.

The lower appellate Court has held that the payment of Rs. 2,400 to Zunkari has been duly proved and that finding is binding on this Court. The only question that arises is whether the payment extinguished the mortgage, in view of the fact that the plaintiffs subsequently successfully established their title to Kasturchand's estate against Zunkari. The lower appellate Court has held that it did not. The trial Court gave the plaintiffs a foreclosure decree for Rs. 3,000 and costs, but the lower appellate Court reduced the decretal amount to Rs. 2,400

and proportional costs. Ganpat now appeals.

Under the circumstances of this case he is entitled to succeed. Mt. Zunkari was in possession of Kasturchand's estate from the death of Kasturchand on 11th March 1911, till she was ousted in pursuance of a decree passed in a suit which was not filed till 31st January 1913. Apparently there had been indications before that date that the plaintiffs were disputing her title, for the parties now admit that Mt. Zunkari got a succession certificate in respect of certain debts (not including the one in suit) and the plaintiffs resisted her claim. But the record does not disclose the date on which these proceedings were initiated. There is nothing to show that on the date of the payment, 20th May 1912, Ganpat had any reason to believe that Mt. Zunkari's title was not good.

On the contrary, he had reason to believe that she was the undisputed heir of Kasturchand. She had already been in possession of the lands, comprising the bulk of the estate apparently, for 14 months, and there is nothing on the record to show that during that period the plaintiffs had publicly asserted their title or had in any other way warned Ganpat that Zunkari's title was doubtful. Further, the parties are residents of Berar, wherein females have wider rights of inheritance than in other parts of India. A daughter-in-law can inherit and she has been held to inherit in preference to paternal cousins of her own husband *Vithaldas Manickdas v. Jeshubai* (1). This is a proposition which need not be laboured, as it cannot be expected that a man in Ganpat's position would know the intricacies of the Mitakshara and Mayukha; but he may be presumed to know enough of the law of inheritance in Berar not to be surprised or suspicious at an inheritance by a daughter-in-law. The judgment in the suit between the plaintiffs and Mt. Zunkari, of which a copy is filed as Ex. P. 4 shows that the learned Judge recognized the rights of a daughter-in-law generally in Berar, but decided the suit against Mt. Zunkari as the family were immigrants into Berar to whom the *lex loci* did not apply. It is not surprising that Ganpat should accept Mt. Zunkari's title.

On these facts, S. 41 of the Transfer of

(1) [1880] 4 Bom. 219.

Property Act comes into operation. It has been argued that the section applies to transfers of immovable property and that there was no such transfer in this case but only a payment of money. But the payment redeemed a mortgage, and thereby extinguished the rights transferred by the mortgage. In other words, the rights created by the mortgage in favour of the mortgagee were re-transferred to the mortgagor, and in this sense the payment in redemption was as much a transfer as the original mortgage. I hold that the payment of Rs. 2,400 by Ganpat to Mt. Zunkari extinguished the mortgage in suit.

This finding can be justified on grounds of equity. The money paid by Ganpat to Zunkari was a part of Kasturchand's estate. They did obtain a decree for Rs. 5,000 cash against Mt. Zunkari, and it may be presumed that this sum included the Rs. 2,400 recently paid by Ganpat. The plaintiffs themselves seem to have accepted this view for some years; at any rate they put Ganpat in a difficult situation by waiting from 15th May 1914 till when they established their title, the very last available day, 15th January 1923, before they instituted their suit. They knew that the rule of damdupat would apply and that the Rs. 3,000 limit imposed thereby had been reached many years ago. The delay could give them no advantage save an unfair one, and, greatly strengthens Ganpat's claim to equitable treatment.

The appeal is allowed. The decrees of both lower Courts, allowing the plaintiffs' claim in whole and in part respectively, are reversed and the plaintiffs' suit is dismissed. The plaintiffs will pay all costs in all three Courts.

Appeal allowed.

A. I. R. 1927 Nagpur 88

KINKHEDE, A. J. C.

Maroti—Accused—Applicant.

v.

Mt. Kasabai—Complainant — Non-Applicant.

Criminal Revision No. 123-B of 1926, Decided on 12th October 1926, from the decision of the Sub-Divl. Mag., Basim, D/-19th May 1926, in Criminal Appeal No. 39 of 1926.

Criminal P.C., Ss. 424, 367, 421 and 422—Appellant failing to make out case for issue of notice under S. 423 — Court deciding case without notice—Formal judgment giving reasons is necessary—Appellate judgment must contain materials to show that appeal was properly decided.

Where the appellant's pleader fails to make out a case for the issue of notice to the Public Prosecutor and the appellate Court thinks fit to decide the case without such notice, a formal order or judgment giving reasons is necessary to dispose of the appeal. There must be sufficient material in the appellate judgment itself to show that the appeal has been properly tried. The judgment or order must bear marks of such intelligent appreciation on the part of the appellate Court of the necessary facts and materials as would warrant the High Court to infer that the conclusions were properly arrived at by the lower appellate Court: *A. I. R. 1921 Lah. 102* and *20 C. W. N. 1296, Ref. 13 N. L. R. 169, Rel. on.* [P 88, C 2; P 89, C 1]

K. K. Gandhe—for Applicant.

Fida Hussain—for Non-Applicant.

Order.—This order will also govern Criminal Revision No. 124-B of 1926. I presume that the Sub-Divisional Magistrate perhaps thought that the Magistrate who tried the case had given sufficiently good reasons for his conclusions and therefore he could excuse himself from giving them or discussing them at length in his own judgment. If this be so he is mistaken. A perusal of the record of the appellate Court shows that the Sub-Divisional Magistrate did not act strictly under S. 421, Criminal Procedure Code, because besides sending for the record he ordered notice to be given to the appellant's pleader as contemplated by S. 422 of the said Code; he no doubt refrained from issuing any notice to the Public Prosecutor as contemplated by the same section. This clearly shows that the Sub-Divisional Magistrate neither wanted to dispose of the case summarily as provided by S. 421 nor after hearing both parties; but wishes to peruse the record and hear the appellant's pleader's arguments on the very question of admission of the appeal. He was perfectly justified in adopting such an intermediate course.

If the appellants' pleader failed to make out a case for the issue of notice to the Public Prosecutor and the appellate Court thought fit to decide the case without such notice, I am of opinion that undoubtedly a formal order or judgment giving reasons was necessary to dispose of the appeal. The reason for the rule is not far to seek. It is of course well known that ordinarily all cases go before

a superior tribunal in revision; a revisional Court cannot deal with an application in revision properly if the order with which it is asked to deal sets out no grounds for the conclusion which has been reached. Reasons for the decision should be given by the appellate Court in order that the superior Court may at once know the facts found and the reasons therefore without reference to the record; *Sanwant v. Queen-Empress* (1), and judgment of trial Court in *Dalip Singh v. The Crown* (2), and satisfy itself as to whether the lower Court has in fact done its duty by an honest and careful consideration of the case: *Queen-Empress v. Pandeh Bhat* (3) and *Lal Behari v. Emperor* (4). In short there must be sufficient material in the appellate judgment itself to show that the appeal has been properly tried. The judgment or order must bear marks of such intelligent appreciation on the part of the appellate Court of the necessary facts and materials as would warrant this Court to infer that the conclusions were properly arrived at by the lower appellate Court: cf. *Dalip Singh v. The Crown* (2) and *Arindra Rajbunshi v. King-Emperor* (5). That it is advisable that the Court of criminal appeal should give as concisely as possible at least the main reasons which govern its order as pointed out by this Court in *Ramrao v. Emperor* (6).

I am entitled to presume that the Sub-Divisional Magistrate concerned keeps himself in touch with at least the rulings of this Court and writes his judgment in compliance thereto. But, it appears that, so far as this case is concerned he has failed to do so. In the reported case some reasons were given to support the conclusion and the order sought to be set aside in revision was therefore maintained; but here no reasons are given and hence the present case is distinguishable from that case. I am therefore compelled to set aside the conviction and sentence and send the case back to the Sub-Divisional Magistrate to write his judgment in the appeal in compliance with the provisions of S. 367, Criminal

Procedure Code, read with S. 424 of the Code.

The application is allowed and the record is ordered to be sent back without delay to the Sub-Divisional Magistrate for disposal of Criminal Appeals Nos. 39 and 40 of 1926 with advertence to the above remarks.

Application allowed.

A. I. R. 1927 Nagpur 89

KINKHEDE, A. J. C.

Raje Dattajirao — Plaintiff—Appellant.

v.

Puranmal—Defendant—Respondent.

Second Appeal No. 248B of 1924, Decided on 10th September 1926, from the decision of the Addl. Dist. J., Buldana, D/- 30th April 1924 in Civil Appeal No. 45 of 1923.

(a) *Custom—Proof—Antiquity—No time limit can be fixed—Duration during the living memory leads to presumption of antiquity—Judicial decisions are helpful in proving a custom.*

As to the length of the user or enjoyment which must be proved before the antiquity of a local custom may justifiably be inferred, it is difficult to lay down any definite rule. But it can be safely said that where the user is taken back as far as living memory goes, it should ordinarily suffice to give rise to the inference of immemorial enjoyment of the right. The evidence required must also be such as to prove not only the uniformity and continuity of the usage but also the conviction of those following it that they are acting according to law. To prove a customary right to impose a charge, a single instance must not be sufficient; there must be evidence of instances of persons who have actually paid it. Judicial decisions also afford very valuable evidence as to the existence of a custom, because what the law requires before an alleged custom can receive the recognition of the Court and thus acquire legal force, is satisfactory proof of usage of such long standing and so invariably acted upon in practice as would go to show that it has, by common consent, been submitted to as the established governing rule of the particular class or district of the country; and the course of practice upon which the custom rests must not be left in doubt but be proved with certainty: 3 *M. H. C. R.* 75; 17 *All.* 87; 20 *Mad.* 389; 23 *Bom.* 366 and *A. I. R.* 1925 *P. C.* 213, *Rel. on.* [P 91, C 2]

(b) *Custom—Reasonableness or otherwise of custom should be seen with regard to the inception—Custom of Dhadiwai is not unreasonable or opposed to public policy—Contract Act, S. 23.*

The period for ascertaining whether a particular custom is reasonable or not, is the time of its inception. It is not logical to say that what

(1) [1897] 18 P. R. 1897 Cr.

(2) *A. I. R.* 1921 Lah. 102=2 Lah. 308.

(3) [1897] 19 All. 506=(1897) *A.W.N.* 142(F.B.)

(4) [1916] 38 All. 393 = 35 I. C. 485 = 14 *A. L. J.* 445.

(5) [1916] 20 C. W. N. 1296=38 I. C. 326.

(6) [1917] 13 N. L. R. 169=42 I. C. 721.

may now appear to be unreasonable must have been so from its inception and then to conclude that no valid custom has been established.

[P 93 C 1, 2]

Where the owners of the village established the market; they dedicated their own land to the use of the public as a market place, and also took upon themselves the obligation of rendering some service namely to find not only customers for the goods brought there for sale but also to provide a regular establishment of reliable weighmen in the interests of the community and in consideration of this charged a certain percentage called Dhadwai on the commodity sold.

Held: that the custom of Dhadwai was neither unreasonable nor opposed to public policy; 28 *Mad.* 520, *Dist.* 36 *Bom.* 94 and 7 *M. I. A.* 263 (P. C.), *Rel. on.* [P.93 C 2, P 95 C 1]

H. S. Gour and *M. B. Niyogi*—for Appellant.

B. K. Bose—for Respondent.

Judgment.—This second appeal arises out of a suit instituted by the appellant under the following circumstances.

The village of Deolgaon Raja was settled by one Raja Jagdeo to whose family the plaintiff claims to belong. It is said that the plaintiff's family has since time immemorial been in the enjoyment of various rights within the limits of the said village and the right known as Dhadwai shete right is one of such rights. The plaintiff claims the sole right to weigh and measure and secure customers for the commodities which are imported within the limits of Deolgaon Raja village, and to realize on that account from the commodity one seer per palla of 120 seers and in case of ghee and other articles one quarter anna per rupee. It is further alleged that the defendant used to pay the plaintiff his customary dues of Dhadwai up to the year 1919; he, however, refused to allow plaintiff's servants to weigh goods during the three years in suit i. e., 1920, 1921 and 1922. The plaintiff, therefore, sued for a declaration of his right to realize the customary dues known as Dhadwai and for the consequential relief of compensation for loss of income which he assessed at Rs. 350 for the 3 years in suit.

The defendant denied in his pleadings that plaintiff had a right to levy the dues known as Dhadwai. He denied having paid anything to plaintiff for his right of Dhadwai in respect of the cotton coming to his ginning factory or for any other goods. He, however, admitted having realized 0-4-0 per cart for the

weighing etc., of cotton during the three years in suit, and that the amount so realized is Rs. 247-8. He filed a schedule showing ghee purchased by him at Deolgaon Raja itself and from outside separately during each year. He, however, contended that the custom pleaded by the plaintiff was against public policy since it restricted the freedom of trade, and also because it forced payment even when no services were rendered by plaintiff and that in fact plaintiff never offered him his services, and he in his turn never refused such offer. The plaintiff maintained that the recoveries which the defendant made from his constituents at the rate of 4 annas per cart were on the representation that they had to be paid over to plaintiff; and his Dhadwai right was not opposed to public policy, and further that he insisted on payment only when he offered services but the same were not accepted by the defendant and that he was always willing to weigh the cotton and ghee in respect of which the present claim was made by him. After a long and protracted trial the first Court decreed the plaintiff's claim for declaration and for Rs. 277-15 for compensation.

The first Court's findings given in paras. 11 and 15 of the judgment may be summarized here for the sake of easy reference, so far as they are material to the decision of this 2nd appeal.

That plaintiff has satisfactorily proved that there is a custom in the Deolgaon Raja limits which include the ginning factories situate there, under which he has a right to charge Dhadwai huq on cereals, cotton, ghee and jagri etc., coming for sale within the aforesaid boundary at the rates, alleged by him, and further that this right has an obligation attached to it namely of finding out a customer and weighing the goods; that this custom has been in existence, and is being exercised since long time past (possibly since the time when the village was established by the plaintiff's forefathers that is in the 17th century) and is a very ancient custom.

That all the attributes of a valid custom namely that it must be immemorial, reasonable, continuous and certain in respect of its nature generally as well as in respect of the locality where it is alleged to obtain and the persons whom it is alleged to affect, are proved to exist in this case and that the custom set up was

enforceable at law not being in restraint of trade or opposed to public policy.

The defendant being dissatisfied with this decision went up in appeal to the Additional District Judge, Buldana, and prayed for the dismissal of the suit. The learned Additional District Judge first discussed the attribute of reasonableness of a valid custom and coming as he did to the conclusion that though the custom was reasonable at its origin it had ceased to be so, he held that the plaintiff's claim for the right of sole measurement was an invasion of the rights of owners of property without any benefit to the commonwealth and was, therefore, injurious to the multitude and prejudicial to the commonwealth, and that this Dhadwai right of the plaintiff was consequently unreasonable and as such void and opposed to public policy and unenforceable at law. Although he observed that in this view it was unnecessary to decide the other points raised in appeal, he gave his decision on them also. As regards the remaining attributes of the custom in dispute his conclusion is that it has been proved to be immemorial, continuous and certain as regards the locality and the persons affected by it. But in the view that the custom was unreasonable and against public policy he allowed the appeal and dismissed the suit.

Before me the plaintiff-appellant challenges the correctness of the lower appellate Court's above conclusion about the unreasonableness of the custom; the respondent in his turn while maintaining the correctness of the lower appellate Court's decree dismissing the suit contests the correctness of the finding so far as it upholds the existence of the custom and its attributes of antiquity. I will, therefore, deal with these points in the following paras. I think I had better first examine the defendant's contentions before me, because if the custom is not proved to exist or to be immemorial the dismissal of the suit can be maintained on that ground that it would be wholly unnecessary to enter into the larger question raised by the plaintiff's appeal as to whether a custom which is admittedly held to be reasonable in origin can cease to be so and becomes unenforceable at law. (The judgment then discussed the evidence and finding that the existence of the custom was

proved continued.) The next question is about its antiquity. It is contended that the evidence on record does not take us beyond 30 years and that this is not sufficient in law to prove the antiquity of the custom. As to the length of the user or enjoyment which must be proved before the antiquity of a local custom may justifiably be inferred, it is difficult to lay down any definite rule. But it can be safely said that where the user is taken back as far as living memory goes it should ordinarily suffice to give rise to the inference of immemorial enjoyment of the right. The evidence required must also be such as to prove not only the uniformity and continuity of the usage but also the conviction of those following it that they are acting according to law. To prove a customary right to impose a charge, a single instance must not be sufficient; there must be evidence of instances of persons who have actually paid it. Judicial decisions also afford very valuable evidence as to the existence of a custom, because what the law requires before an alleged custom can receive the recognition of the Court and thus acquire legal force is, satisfactory proof of usage of such long standing and so invariably acted upon in practice as would go to show that it has, by common consent, been submitted to as the established governing rule of the particular class or district of the country; and the course of practice upon which the custom rests must not be left in doubt but be proved with certainty: cf. *S. Perumal Sethurayar v. M. Ramalinga Sethurayar* (1).

I may also say that the observations of Edge, C. J. and Banerji, J., in *Kuar Sen v. Mamman* (2), which have received the concurrence of the Madras High Court in *Palaniandi Tevan v. Puthirangonda Nandan* (3) and the Bombay High Court in *Mohidin v. Shirlingappa* (4) point out what kind of evidence should be required to prove the existence and antiquity of a local custom. Before the Court is justified in finding in favour of its antiquity, it must be satisfied of its reasonableness and its certainty as to extent and application and also of the enjoyment of the right not being by

(1) 3 M. H. C. R. 75.

(2) [1895] 17 All. 87=(1895) A. W. N. 10.

(3) [1897] 20 Mad. 389.

(4) [1899] 23 Bom. 666=1 Bom. L. R. 170.

leave granted, or by stealth, or by force, but of its having been

openly enjoyed for such a length of time as suggests that originally by agreement or otherwise the usage had become customary law of the place in respect of the persons and things which it concerned.

To put it in the words of Tindal, C. J.:

The custom, in fact, comes at last to an agreement, which has been evidenced by repeated acts of assent on both sides from the earliest times, beginning before time of memory and continuing down to our own times, that it has become the law of the particular place *Tyson v. Smith* (5).

Several witnesses examined in this case have deposed that the custom of payment of Dhadwai has been in force in the village since the time of their ancestors. No attempt was made to challenge their veracity. This shows that the custom is so well known and acquiesced in by the people that it may be presumed that the usage has become the customary law of the place in respect of the persons and things which it concerned. In *Ratilal v. Motilal* (6) instances over 25 years old were held sufficient to establish immemorial custom. In *Ali Mohammad v. Seikh Katu* (7) evidence of enjoyment as of right for 30 or 40 years was held sufficient to prove antiquity. Their Lordships of the Privy Council have held that where the existence of a custom for some years was proved by direct evidence, it could be shown to be immemorial only by hearsay evidence: *Rajendra Narain Dhanj v. Gangananda Singh* (8). Looking therefore at the evidence on record in the light of the decided cases and the principles accepted in them, I think the conclusion is irresistible that the evidence on record takes the custom in question beyond living memory and is sufficiently ample to prove its antiquity. The finding of the lower appellate Court that the attribute of antiquity has been established in this case is thus supported by evidence proper for consideration and is binding on me in second appeal.

I now turn to the discussion of the question as to how far the lower appellate Court's decision that this ancient

and continuous custom, which has also been proved to exist with certainty as regards the locality and the people affected by it, and which was admittedly reasonable in its origin ceased to be so, is against law. The grounds on which the learned Additional District Judge held it to be unreasonable are set forth by him towards the end of paragraph 4 of his judgment. The gist of his line of reasoning, as I understand it, seems to be that, with increasing number of traders and better trade facilities, the necessity to get one's goods brought for sale to the market-place weighed only through the Dhadwai, i. e., the plaintiff's licensed measurer, has ceased to exist, and as it often causes unjustifiable detention and other hardships to the customers, and sometimes they are required to pay the dues to plaintiff without getting his services in the matter of weighment or of securing purchasers, what was reasonable in the beginning has now become unreasonable. In other words, although according to him, efforts had to be made in the beginning by the owners of the village to establish a market-place therein in order to encourage trade by giving every facility to the constituents in the matter of finding purchasers ready to purchase their goods if brought there, and also by way of assurance to them against deception being practised on them by purchasers in the matter of weighment or measurement, and though they (owners of the village) had imposed upon themselves a sort of legal duty or obligation to entertain a regular establishment of reliable Dhadwais to measure the goods and to procure purchasers for them, and in consideration of this help legally obtainable from them (i. e., owners of the market-place), the owners of goods gave them the Dhadwai dues, he opines that the reason for the said rules of practice or usage of the market-place having ceased to exist now in these days of larger freedom of trade, the plaintiff's claim is not enforceable at law.

Thus, according to the learned Judge, what was reasonable in the beginning, when the village was settled or the market-place established, can now be treated as unreasonable in the present altered conditions of trade facilities. In short, though the usage had become the customary law of the place it can be

(5) [1838] 48 R. R. 539=9 A. & E. 406=112 Eng. Rep. 1265=1 P. & D. 307=1 W. W. & H. 749.

(6) A. I. R. 1925 Bom. 380.

(7) A. I. R. 1923 Cal. 200.

(8) A. I. R. 1925 P. C. 213=4 Pat. 788.

ignored now in view of the altered condition of affairs of the present day.

I am firmly of opinion that the learned Additional District Judge has not considered this aspect of the custom properly and in the light of legal principles recited in the very case of *Mahamaya Debi v. Haridas Haldar* (9) on which he relied and his decision cannot therefore be upheld. The following observations are very significant of the principle on which they are based. They show that the primary attribute of a valid custom is that it must be reasonable at the beginning :

When, however, it is said that a custom is void, because it is unreasonable, nothing more is meant than that the unreasonable character of the alleged custom conclusively proves that the usage, even though it may have existed from time immemorial, must have resulted from accident or indulgence and not from any right conferred in ancient times : *Salisbury v. Gladstone* (10). It is also well settled that the period for ascertaining whether a particular custom is reasonable or not is the time of its possible inception; this is in accord with the observation in the *Tanistray* case (11) : the 'commencement of a custom (for every custom hath a commencement, although the memory of man doth not extend to it, as the river Nile hath a spring although geographers cannot find it) ought to be upon reasonable ground and cause, for if it was unreasonable in the original, no usage or continuance can make it good : *Quod ab initio non valuit tractu temporis non convalescet*. When tested in the light of these principles, no good ground can be assigned why the custom should be condemned as unreasonable. * * * * Since customs in general involve some inconsistency with the general common law of the realm or are contrary to a particular maxim, the fact of this inconsistency is not of itself a ground for holding the custom unreasonable and bad : *Tyson v. Smith* (2).

Thus the reasonableness or otherwise of the custom of charging Dhadwai in the present case must be determined with reference to the period of its commencement and not of its present working. The Additional District Judge having once found that it was reasonable in its origin, he should have refrained from going out of his way to consider whether it could cease to be so or be now disregarded as unreasonable and declared unenforceable in view of the recent increasing trade facilities.

A custom which may be prejudicial to a class, but beneficial only to a particular individual, is no doubt repugnant to the law of reason. But in my opinion it is not logical to say that what may now appear to be unreasonable must have been so from its inception and then to conclude that no valid custom has been established. Taking into consideration the fact that when the owners of the village established the market, they dedicated their own land to the use of the public as a market-place, and also took upon themselves the obligation of rendering some service, namely, to find not only customers for the goods brought there for sale, but also to provide a regular establishment of reliable weighmen, it must be held that they were doing so for the benefit of the commonwealth and in the interest of the large multitude of people who frequent the market-place and do business there. They were not doing so primarily from motives of self-interest or self-aggrandisement or individual benefit, but they acted in that manner because they were actuated by motives of serving the good of the general public and that too because they thought they owed, as owners of the village, a legal duty as it were to afford such facilities to their fellowmen, ryots and other persons resident in their village. In undertaking to secure purchasers and weighmen they had placed themselves under an 'obligation' which includes 'every duty enforceable by law' in view of S. 3 of the Specific Relief Act. This obligation was in the nature of a tie or bond which constrained them to do or suffer something; it implied a right in another person to which it is correlated, and restricted their freedom with reference to the definite acts and forbearances which they undertook to do or forbear. In short, the obligation was a legal obligation in the nature of a legal duty and not merely a moral, social or religious obligation. To say that the custom is unreasonable or opposed to public policy because if it is to be observed the constituents are often required to wait long for want of measurers or weighmen and sometimes pay the dues to the Dhadwai without having the benefit of the services, is to make an assumption unwarranted by law; that the arms of the law are not long enough to reach and compel plaintiff to employ a larger establishment of

(9) [1915] 42 Cal. 455=20 C. L. J. 183=27 I. C. 400=19 C. W. N. 203.

(10) [1861] 9 H. L. C. 692=131 R. R. 403=9 W. R. 930=34 L. J. C. P. 222=8 Jur. (N. S.) 625=4 L. T. 849.

(11) [1603] Davis 29=80 E. R. 515.

measurers or weighmen at the instance of the constituents.

The inconvenience of this kind cannot be said to be incapable of being remedied by a proper suit against plaintiff for enforcement of due performance on his (plaintiff's) part of his legal obligation in these matters. To say that owners of goods no longer stand in need of plaintiff's mediation in the matter of finding purchasers to purchase or weighmen to weigh their goods, and therefore the custom is unreasonable, is equally unsound in law. This is not an argument against the custom being reasonable in its original commencement; it is an objection only as to the mode of exercising the right. An inconvenience of this kind is inevitable because but for the facilities already enjoyed, and the encouragement given, the market-place would not have earned the reputation it is now enjoying as a fit place for carrying on business on a flourishing scale. It is not in the fitness of things that the latter day settlers should reap the full benefit of all the facilities of the market being held there and at the same time be in a position to set at naught the mercantile usages obtaining in the locality and thus repudiate the burden that is cast on them by such time-honoured usages. It stands to reason that if one want to take advantage of the special facilities of a particular situation, locality or market-place he must do so subject to the burden the mercantile usage has imposed there.

Moreover, since every custom sanctioned by the Courts must be reasonable it follows that every judicial case where the custom of Dhadwai has been upheld by the Court is evidence of the reasonableness of the custom. As is apparent we have got three such instances on record in which this custom was recognized by the civil Court and forced as a reasonable custom in view of the plaintiff's obligation to discharge the aforesaid duty of finding a purchaser for goods brought in the market and of weighing them. In the absence of any rebutting evidence on the defendant's side to show that the custom has ceased to be reasonable, the only legal inference possible under circumstances was that the custom did not cease to be reasonable.

The Additional District Judge on the strength of the case of *Somu Pillai v.*

The Municipal Council, Mayavaram (12) has propounded a view that, if this custom were upheld, the plaintiff would, as it were, get a monopoly to weigh the goods in the locality, and that as a custom which creates such a monopoly is void and opposed to public policy it should not be recognized as enforceable at law. Suffice it to say that the Madras case has no analogy to the present one, as it was a case of monopoly not sanctioned by the Madras District Municipalities Act 4 of 1884 and the Courts were, therefore, justified in refusing to presume the existence of legislative intention in conflict with public policy and to infer grants of monopolies as they were, prejudicial to the public welfare. Here the so-called monopoly does not owe its origin to any such thing. On the contrary it is in the nature of a right to levy some dues for the use of the land of the proprietor as a market-place and for his readiness to discharge the obligation to find out purchasers and also to provide weighmen for goods and commodities brought for sale to the market; it may be supportable even as a right which is more or less analogous to or at least partakes of the nature of what is known under Hindu Law as a 'Nibandh' which is treated as an interest in immovable property and can be created by a private individual as well as by a royal personage: cf. *Ghelabhai v. Hargowan* (13).

It must be observed that even looking at the case simply from the point of view of mercantile usage as distinguished from a local custom, the above conclusion is the only conclusion possible under the circumstances of the case, as the following observations of their Lordships of the Privy Council in *Juggomohun v. Manickchand* (14) which put the matter very tersely would show:

It remains now to consider the other ground on which the plaintiff relied: the evidence of mercantile usage. To support such a ground, there needs not either the antiquity, the uniformity, or the notoriety of custom, which in respect of all these becomes local law. The usage may be still in course of growth; it may require evidence for its support in each case; but in the result it is enough if it appear to be so well known and acquiesced in, that it may be reason-

(12) [1905] 28 Mad. 520.

(13) [1911] 36 Bom. 94=12 I. C. 928=13 Bom. L. R. 1171.

(14) [1858] 7 M. L. A. 263=4 W. R. 8=1 Suther. 357=1 Sar. 681 (P. C.).

ably presumed to have been an ingredient tacitly imported by the parties into their contract.

Such usages are expressly saved from the operation of the Indian Contract Act as seen from the Privy Council decision in the *Irrawaddy Flotilla Company v. Bugwandas* (15) where their Lordships of the Judicial Committee referring to S. 1 of the Contract Act, observed that the words 'not inconsistent with the provisions of this Act' were not connected with the clause "nor any usage or custom of trade." "Both the reason of the thing and the grammatical construction of the sentence—if such a sentence is to be tried by any rules of grammar—seem to require that the application of those words should be confined to the subject which immediately precedes them" (meaning the words "nor any incident of any contract"). That they will faithfully observe the mercantile usage of the market-place must therefore be considered as an ingredient tacitly imported in the contracts the settlers presumably made with owners of the village when they were permitted to settle down as traders in that locality. If this view is correct the defence based on public policy under S. 23 of Contract Act cannot stand. It would thus be clear that there is nothing in the custom or usage to which exception can be taken on the ground of its being opposed to public policy and the custom is perfectly valid and enforceable in a Court of law.

For all these reasons I reverse the finding of the lower appellate Court and hold that the attributes of a valid custom of Dhadwai, not only as regards its antiquity, continuity and certainty, but also its reasonableness, are fully established in this case and as such it is enforceable at law. The lower appellate Court's decree dismissing the suit is therefore set aside and the decree of the first Court restored with costs of all three Courts to be paid by the defendant-respondent.

Appeal allowed.

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KINKHEDE, A. J. C.

Shakurkhan—Plaintiff—Applicant.

v.

Sheikh Budhan—Defendant—Non-applicant.

Civil Revision No. 95-B of 1926, Decided on 2nd October 1926, from the order of the Small Cause Court J., Akola, D/- 24th April 1926, in Small Cause Court Suit No. 148 of 1925.

(a) *Civil P. C., S. 151*—Too much importance should not be given to form if it tends to defeat justice—Application to set aside Small Cause Court's ex-parte decree dismissed—No revision filed under S. 25, Provincial Small Cause Courts Act—No remedy exists under S. 151—*Civil P. C., O. 9, R. 13.*

Procedure is not the machinery of the law and as such too much importance cannot be given to form if it tends to defeat justice : 33 *Bom. 644* and *Nag. C. R. 141-B* of 1926, *Foll. [P. 96, C. 1]*

Where an application for setting aside an ex-parte decree of a Small Cause Court has been dismissed and the applicant did not avail himself of the right to apply in revision under S. 25 of the Provincial Small Cause Courts Act, he has no remedy under S. 151 : *Case law Ref. to.*

[P. 96, C. 1, 2]

(b) *Civil P. C., O. 6, R. 17*—Amendment is retrospective at least from date of application.

An amendment of plaint has a retrospective effect, at least with effect from the date of the application. [P. 96, C. 1]

W. B. Pandharkar—for Applicant.

A. Rizak—for Non-applicant.

Order.—This is a revision against an order setting aside an ex-parte decree upon a petition made not under O. 9, R. 13, Civil P. C., but under S. 151, Civil P. C. The beauty of the learned Small Cause Court Judge's procedure lies in the fact that he rejects the regular application for setting aside the decree as the necessary deposit of costs was not made, but proceeds to entertain a petition to strike out the defendant's name from the decree on the ground that the claim was barred by limitation at the time when the non-applicant was made a co-defendant. A reference to the order-sheet, dated 21st April 1925, discloses a peculiar mentality or tendency on the part of the Judge, the like of which would seldom be met. The Judge seems to attach too much importance to form rather than

(15) [1891] 18 Cal. 620 = 18 I. A. 121 = 3 Sar. 40 (P. C.).

to substance, with the result that he sets the importance of form in an incorrect perspective and proceeds to drive out a defendant who is present in Court, and declines to pass a decree against him simply because his name is not stated on the stamped portion of the plaint. I think such an attitude on the part of a judgment is a height of technicality of procedure and cannot be tolerated.

Procedure is but the machinery of the law, and as such too much importance cannot be given to form if it tends to defeat justice as was pointed out by the Bombay High Court in *Kisandas Rupchand v. Rachappa Vithoba* (1), and by me in *Harmasji v. Kondi* (2). When the lower Court entered the plaintiff's application the very next moment for amending the plaint so as to disclose his name on the stamped portion of the plaint and ordered notice to issue to the person driven out by itself, it must be deemed to have permitted the amendment then and there, and the amendments subsequently carried out had a retrospective effect so as to make the non-applicant Budhan a party defendant, at least with effect from the date of the application, i. e., from 21st April 1925, when the claim was well within time.

It was not a case of a new party being added under S. 22 of the Limitation Act so as to make him a party only since the date of service of summons on him. Even assuming that he was impleaded as a party defendant after limitation, he had his remedy to move the Court at the hearing; but as he failed to appear the Court passed a decree against him on 17th August 1925. Thereafter his remedy was to move for the setting aside of the decree or for review or revision. Not having followed any of these remedies, or at any rate having failed in some of them, I fail to see how he can invoke the aid of the inherent jurisdiction under S. 151, Civil P. C., to delete his name and thus get rid of a decree which had become binding and final as against him. An application for setting aside the ex-parte decree having been dismissed, and no application for

review being maintainable for correcting a mistake of law committed in decreeing a time-barred claim and the defendant-non-applicant not having availed himself of even the right to come up in revision, to this Court under S. 25 of the Provincial Small Cause Courts Act, he had no remedy under S. 151, Civil P. C. This seems to be the trend of the decisions of the several High Courts: cf. *Arumuga v. Piriavanjiappa* (3); *Joshi Shib Prakash v. Jhingurin* (4); *Tota Ram v. Panna Lal* (5), *Sibitri Thakurain v. Savi* (6); *Mt. Mulia v. Partab* (A. I. R. 1924 Nag. 325); *Virappa v. Basappa* (7); *Anant Potdar v. Mangal Potdar* (8); *Ajodhya Mahton v. Mt. Phul Kuer* (9) and *Bissa Mal v. Kesar Singh* (10).

I, therefore, hold that the lower Court was wrong in exercising its so-called inherent jurisdiction under S. 151, Civil P. C. The order deleting the name of Budhan from the decree is set aside and it is declared that he will be treated as a co-judgment-debtor as before. The application is allowed; but, in the circumstances of the case, I direct that each party shall bear his own costs.

Application allowed.

(1) [1909] 33 Bom. 644=4 I. C. 726=11 Bom. L. R. 1042.

(2) Civil Revision No. 141-B of 1925.

(3) A. I. R. 1924 Mad. 489.

(4) A. I. R. 1924 All. 446=46 All. 144.

(5) A. I. R. 1924 All. 668=46 All. 681.

(6) [1921] 48 Cal. 481=60 I. C. 274=48 I. A. 76 (P. C.).

(7) A. I. R. 1926 Bom. 139.

(8) A. I. R. 1926 Pat. 27=4 Pat. 704.

(9) A. I. R. 1922 Pat. 479=1 Pat. 277.

(10) [1920] Lah. 363=58 I. C. 789=2 L. L. J. 249.

A. I. R. 1927 Nagpur 97

KOTVAL, O. J. C., AND PRIDEAUX,
A. J. C.

Mukundrao and another—Defendants—Appellants.

v.

Wamanrao—Plaintiff—Respondent.

First Appeal No. 29 of 1925, Decided 29th September 1926, from the decree of the Addl. Dist. J., Nagpur, D/- 22nd December 1924, in Civil Suit No. 31 of 1923.

(a) *Hindu Law—Gift of Rs. 15,000 out of estate worth a lac is excessive and if made out of caprice, cannot be upheld.*

A gift of Rs. 15,000 out of an estate worth about a lac is excessive, and where it is more guided by caprice than propriety it cannot be upheld. [P. 98, C. 2]

(b) *Hindu Law—Gift to nephew or son stands on different footing from one to daughter or daughter-in-law as to quantum of gift.*

Cases of gifts to a daughter or a widowed daughter-in-law having some sort of a moral claim on the donor stand on a much higher footing than the sons of a separated brother, at least so far as the question of the quantum of the gift is concerned. A gift that might be reasonable in the case of either of these persons may be unreasonable in the case of a nephew, or possibly even a son: 35 *Mad.* 628, *Rel. on.* [P. 98, C. 2]

B. K. Bose and W. R. Puranik—for Appellants.

R. R. Jayavant—for Respondent.

Judgment—This appeal arises out of a suit for the recovery of Rs. 15,000 said to have been gifted by the plaintiff's father to the defendants out of the ancestral property in his hands. For the purposes of this appeal the pleadings may be stated as follows: The case of the plaintiff Waman Rao was that his father Marotirao and Balaji, the father of the defendants Mukundrao and Padamrao, were separated brothers. On the 19th May 1911 Marotirao executed a registered gift deed for Rs. 15,000 in favour of the defendants. The amount was made up as follows:

Rs. 13,296-2-0	... Deposited with Balaji.
" 1,700-0-0	... The value of three bonds.
" 3-14 0	... Cash.

The plaintiff sued to recover this amount alleging that it was part of the ancestral property in the hands of his father and that the gift is void as his father had no power to make it without his consent. The defence was that the amount was never actually received by the defendants, the gift deed being a

nominal transaction resorted to by the plaintiff's father to save himself from harassment by the plaintiff, and that in any case the father was competent to make it as a gift of affection, the amount gifted being a small, that is, a tenth part of the ancestral estate.

The lower Court found that the gift was really made, that the gift deed was not a nominal transaction and that a gift of Rs. 15,000 out of an estate worth about a lac was unreasonable and void. It decreed the plaintiff's claim for Rs. 13,500 disallowing the value of the bonds on the ground that they might not have represented good debts and there was no satisfactory evidence as to what the defendants recovered on them. The defendants appeal and the plaintiff files a cross-objection. Two points are urged in the appeal. It is first urged that no actual transfer of money to the defendant is proved. Admittedly Rs. 13,296-2-0 were deposited with Balaji for safe custody (Exh. D. 2). On the 23rd April 1911 Marotirao executed Exh. D. 1 acknowledging that he had personally received the amount that day. On the 19th May 1911 Marotirao executed the registered gift deed mentioned above, of which Exh. P. 20 is a certified copy. Admittedly his books of account contain entries consequent upon these transactions. It is difficult to believe that Marotirao, who is said to have been a miser (see Gorakhnath, P. W. 8), spent Rs. 75 on the purchase of stamps and wrote and registered the deed and made the entries unless the gift was actually made. The reason assigned for Marotirao's act being all nominal does not appeal to us. Narayanrao (D. W. 11) who states that he and Maruti (D. W. 4) advised Marotirao to execute a fictitious deed of gift, is unable to say how such a document would have prevented the plaintiff from demanding money or removing it, which were the acts of harassment from which Marotirao acquired protection. Maruti (D. W. 4) states that the plaintiff's demands continued even after the deed. We agree with the finding of the lower Court that the defendants did receive the money and bonds stated in the gift deed.

The next point urged is that the gift was within the competence of Marotirao as a gift of affection. Though we

have held that Marotirao did make a gift of Rs. 15,000 to the defendants, yet considering the circumstances that there was some disagreement between him and the plaintiff and that he was living with Balaji, the gift appears to have been moved rather by displeasure against his son than by affection towards the nephews. This view finds support in one of the defendants' own witness, Maruti (D. W. 4), who says that Marotirao showed no particular affection for the defendants; nor does Mukundarao, Defendant 1, say anything in his deposition about Marotirao's affection for him and his brother. We are inclined to agree with the lower Court in holding that there is some truth in the plaintiff's deposition as P. W. 5 that the gift was brought about partly by Balaji spreading false reports about him and prejudicing Marotirao against him and partly by harassment of Marotirao. This being so, the gift is not a bona fide gift out of affection which comes within the class of gifts mentioned in the Mitakshara, Ch. 1, S. 1, para. 27; see *Raghunath Prasad v. Govind Prasad* (1) and *Nand Ram v. Mangal Sen* (2).

It is to be noted that Marotirao does not profess to make the gift out of joint family property but out of what he states is his own exclusive and self-acquired property and the defence is largely directed to asserting and proving that the property in Marotirao's hands was in law entirely at his disposal. The deed contains the following recital as to the gift:

I have got one son by name Waman with whose conduct I am not satisfied. Still, adequate movable and immovable property is in his possession for his maintenance; and he lives separate, and so do I. At present I am about 70 years of age and have grown old; and there is no knowing when I shall die. Mukundarao, son of Balaji Deshmukh, and his brother Padamrao, son of Balaji Deshmukh, are my real nephews and act up to my comforts. I have come to entertain a desire to give away some of the property held by me to the members of my family, e.g., to both the said nephews. And both the nephews also hope for the same, and depend upon me accordingly. So this day, I, out of my own free will and pleasure, put the undermentioned property into the possession of them both, the said Mukundarao and Padamrao, and lay it down in writing that nobody else nor my son can now claim that gifted property; because the property is my self-acquisition and is in my possession,

and because I am the absolute owner and have therefore got full rights to give it away to the nephews belonging to my family.

This seems to evidence more a reward given and expected for services rendered or to be rendered (which is not the defendants' case) than a gift out of affection. The reference to the unsatisfactory conduct of the son suggests a retributory tinge in the gift. Assuming, however, that nephews come within the class of persons to whom a gift out of affection may be made and that the gift is one out of affection, we are of opinion that the gift, is, under the circumstances of the case, excessive, and one more guided by caprice than propriety, which according to the *Virmitrodaya* it should not be. We are not satisfied that the gift is one of a "small share" of the movable ancestral property. The instances cited where gifts out of affection were upheld by Courts are cases of gifts to a daughter or a widowed daughter-in-law having some sort of a moral claim on the donor: see, for instance, *Sudararamayya v. Sitamma* (3). Such persons in our opinion, stand on a much higher footing than the sons of a separated brother, at least so far as the question of the quantum of the gift is concerned. A gift that might be reasonable in the case of either of these persons may be unreasonable in the case of a nephew, or possibly even a son. If Marotirao had another son besides the plaintiff and had made the gift in dispute to him, we should have hesitated to uphold it as a reasonable or proper one under the circumstances. The defendants as his nephews, cannot be in any better position than his son. We are of opinion that the plaintiff's claim has been rightly decreed.

The plaintiff has filed a cross-objection regarding the amount of the bonds transferred by the deed. The gift having been found to have been genuine, the presumption is that the bonds as recited in the deed were transferred to the defendants, and it seems to us that it was for them to show that the bonds were valueless and that they recovered nothing on them. Beyond a denial of their receipt, which we find is untrue there is no evidence adduced by the defendants except defendant Mukundarao's statement that he was not paid anything on account of the bonds

(1) [1886] 8 All. 76.

(2) [1909] 31 All. 359=1 I. C. 797=6 A. L. J. 415.

(3) [1911] 35 Mad. 628=21 M. L. J. 695=10 I. C. 56=(1911) 1 M. W. N. 422.

by the debtors. We cannot rely on Mukundrao's evidence. On the other hand, there is the evidence of the debtor Tukaram (P. W. 4) that he paid his debt to Marotirao in the presence of Balaji at the latter's shop and that Balaji counted the money. Narayan (P. W. 6) another debtor whose surety was his uncle Pandu, states that he paid the debt owed by him to Balaji as Marotirao told him to make the payment to him. Payment to Balaji was presumably on account of the defendants. The plaintiff deposes that his father's account books show that he ceased to have anything to do with the transferred debts after the gift. Though there is no evidence about the amount of the third bond having been paid by the debtor to the defendants as the onus was on the latter to prove that they realized nothing and as they have failed to prove this the plaintiff is entitled to a decree in respect of the value of this bond as well. The lower Court's decree will therefore be altered so as to decree Rs. 15,000 instead of Rs. 13,300 only.

The appeal is dismissed. The cross-objection succeeds. The appellants will pay the respondent's costs of both.

R.D.

Appeal dismissed.

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KINKHEDE, A. J. C.

Ramchand and another—Defendants—Appellants.

v.

Shri Ratnanath Maharaj Saasthan of Bhar and others—Plaintiffs—Respondents.

Second Appeal No. 392-B of 1923, Decided on 17th September 1926, from the decree of the 1st Addl. Dist. J., of Akola, D/- 15th September 1923, in Civil Appeal No. 332 of 1922.

(a) *Berar Land Revenue Code, S. 223—Privity of estate must be proved as a fact—Nafargats prove only a chain of cultivators and not the nature of his title—Evidence Act, S. 109.*

A privity of estate whether by inheritance or by purchase is a question which must be proved like any other fact; it cannot be the subject of a legal presumption merely. [P. 99, C. 1]

The Nafargats only prove a chain of cultivators in succession, but they do not in themselves prove whether each successor came upon the land under a derivative title or indepen-

dently of the landlord. So long as each cultivator held the land, there might arise a presumption under S. 109 of the Evidence Act that his tenancy had a continuance, but there is no presumption that his successor is necessarily a transferee from him. [P. 99, C. 2]

(b) *Practice—New plea dependent on facts cannot be allowed in appeal.*

A new ground of attack dependent on proof of facts cannot be raised at the stage of appeal.

[P. 100, C. 1]

M. B. Niyogi—for Appellants.

M. R. Bobde and W. B. Pendharkar—for Respondents.

Judgment.—The finding of the lower Courts that the defendants failed to prove that they were ante Jahagir tenants is sufficient for the dismissal of this second appeal. But it is argued that the plaintiff's own Nafargats, which disclose the chain of tenants who held the lands in suit prior to the grant of the jahagir clearly establish the defendants' case that the holding was an ante-jahagir holding and the Courts below should have on the presumption permissible under Ss. 109 and 110 of the Evidence Act held that the several persons mentioned in plaintiff's Nafargats, were the defendants' predecessors in interest within the meaning of Section 223 of the Berar Land Revenue Code. But Kotval, A. J. C., has held in Second Appeal No. 230-B of 1917 that such a presumption is not permissible in the case of a title based on purchase and that the party relying on purchase must prove his purchase. A privity of estate whether by inheritance or by purchase is a question which must be proved like any other fact; it cannot be the subject of a legal presumption merely. The Nafargats only prove a chain of cultivators in succession, but they do not in themselves prove whether each successor came upon the land under a derivative title or independently of the landlord. So long as each cultivator held the land we might presume under S. 109 of the Evidence Act that his tenancy hath a continuance. There is no presumption that his successor is necessarily a transferee from him.

The question raised as regards the applicability of S. 221 of the Berar Land Revenue Code is also a question dependent on proof of facts attending the introduction of the survey settlement in the jahagir. I am not prepared to differ from the lower appellate Court in its view that this new ground of attack

could not be permitted at the stage of appeal: *Nathu Piraji v. Umedmal Gadumal* (1).

The appeal fails and is dismissed with costs.

G.B.J.

Appeal dismissed.

(1) [1909] 33 Bom. 35=1 I. C. 456=10 Bom. L. R. 768.

A. I. R. 1927 Nagpur 100

KINKHEDE, A. J. C.

Govinda—Plaintiff—Appellant.

v.

Bansilal and others—Defendants—Respondents.

Second Appeal No. 481 of 1926, Decided on 14th September 1926, from the order of the Dist. J., Nimar, D/- 23rd January 1926, in Civil Appeal No. 95 of 1925.

(a) *Civil P. C., S. 100—Order dismissing appeal for deficiency of Court-fee is appealable—Dismissal raising question of law—Second appeal lies.*

An order in effect dismissing an appeal for deficiency in Court-fee should be treated as on the same footing with rejection of a plaint for the purpose of determining whether it amounts to a decree or not and an appeal from such order is competent; and where the dismissal of the appeal raises a question of law, for example, as to the interpretation of the Court Fees Act, a second appeal will lie: *A. I. R. 1922 Nag. 62, Rel. on.*

[P 100 C 2]

(1) *Court Fees Act, Sch. 1, Art. 1—Lower appellate Court's decision, as to demanding additional Court-fees but refusing to extend time for complying with it, challenged in second appeal—Art. 1 does not apply but Court Fees Act, Sch. 2, Art. 17, applies.*

Where the subject-matter in dispute is the correctness of the lower appellate Court's decision demanding additional Court-fee and refusing to grant time to comply with it and the resultant rejection of the memorandum of appeal as insufficiently stamped, the relief is not capable of being properly valued and the case cannot be brought under Art. 1 of Sch. 1 and must therefore fall under the residuary Art. 17 of the 2nd Schedule. [P 101 C 2, P 102 C 1]

A. V. Khare and *W. B. Pendharkar*—for Appellant.

W. R. Puranik—for Respondents.

Order.—In a suit for redemption filed by the appellant, the first Court granted a decree for redemption fixing a certain amount as the price of redemption. Against that decree plaintiff appealed and prayed that the mortgage be declared

as fully satisfied. In short he disputed the right of the mortgagee respondent to treat the mortgage as still subsisting and to demand any amount as due under the mortgage. He accordingly paid Court-fee on the principal sum. The respondents objected to the sufficiency of Court-fee paid on the memorandum of appeal. The District Judge upheld the contention and called upon the plaintiff appellant to pay ad valorem fee on the price of redemption fixed from payment whereof he claimed to be exonerated. The appellant got a fortnight's adjournment to apply for leave to appeal as a pauper. At the adjourned hearing he found that there was difficulty in the way of obtaining leave to appeal as a pauper on questions of fact and prayed for time to pay the deficiency. This was refused and the memorandum of appeal was rejected under O. 7, R. 11, read with S. 107 Civil P. C. It is against this order refusing to grant time and rejecting the memorandum of first appeal that the present appeal has been filed on a stamp of Rs. 2 only. The office raised two questions (i) whether this memorandum should be registered as a second appeal and (ii) whether it is properly stamped.

It has been held in this Court in *Gabba v. Kanchhedilal* (1) that an order in effect dismissing an appeal for deficiency in Court-fee should be treated as on the same footing with rejection of a plaint for the purposes of determining whether it amounts to a decree or not. The second appeal filed in that case was held competent in that view. I may observe here that the dismissal of the appeal, under such circumstances raised a question of law as to the interpretation of the Court Fees Act and as such a second appeal will lie. It follows that the order under appeal before me is appealable as a decree and the memorandum of appeal filed in this Court is hereby ordered to be registered as a memorandum of second appeal.

The second question is: What is the Court-fee payable on this memorandum of appeal. This depends upon the question whether it falls under S. 6 read with Art. 1 of Sch. 1 or Art. 11 of Sch. 2 of the Court Fees Act, or if it does not fall under either, whether it is covered by Art. 17 of Sch. 1.

(1) A. I. R. 1922 Nag. 62=18 N. L. R. 15.

In the case of *Gabba v. Kanchhedilal* (1) the Court fee paid on the memorandum of second appeal was Rs. 2 only. No objection was, however, raised there as to the sufficiency or otherwise of stamp on the memorandum of second appeal and hence no decision was given there. In the absence of such a decision the Court fee paid there affords no criterion for a decision of the point raised before me.

I may at once say that since the amendment of Article 11 of Schedule 2 of the Court Fees Act by S. 155 of the Civil Procedure Code of 1908 it has ceased to apply to an appeal against an order rejecting a plaint and a fortiori also to an appeal against an order rejecting a memorandum of appeal. Hence payment of only Rs. 2 as the Court-fee under that article upon such a memorandum of appeal is not warranted by law.

On the other hand Article 1 of Schedule 1 requires that the Court-fee payable thereunder on a memorandum of appeal should be according to the amount or value of the subject-matter in dispute. This shows that the Court-fee is dependent upon (i) what is the subject matter in dispute in appeal and (ii) what is its value. It is enacted under S. 2 (2) of the Civil Procedure Code that a decree shall be deemed to include the rejection of a plaint; but since it is expressly laid down in O. 7, R. 13 of the Code that the rejection of the plaint on any of the grounds mentioned in R. 11 shall not of its own force preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action, it necessarily follows that rejection of plaint does not per se operate as a formal expression of an adjudication which so far as regards the Court expressing it conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit.

In other words the adjudication is not final and conclusive as regards the merits of the case; subject to the law of limitation it is open to a plaintiff to again sue for and obtain the necessary adjudication upon his rights. Indeed the view taken by the lower appellate Court as to the Court-fee payable on the memorandum of appeal has precluded that Court from determining any question as to the respective rights of the parties regarding

the merits of the case. The rejection, whether it be of a memorandum of appeal or of a plaint, therefore practically involves the same result as a summary decision of a civil Court on any preliminary question does, and leaves the merits untouched.

If we look at the appellate Court's decision now under appeal from this point of view it must be said that though the subject-matter in dispute in the first appellate Court was, as the plaintiff might argue it, his right to treat the mortgage as not subsisting on the ground that it was wholly satisfied, the subject-matter in dispute in second appeal is not the price of redemption as fixed by the first Court, but that the only matter agitated here is the correctness of the lower appellate Court's decision demanding additional Court-fee and refusing to grant time to comply with it and the resultant rejection of the memorandum of appeal as insufficiently stamped. This being the only subject-matter in dispute in second appeal what I have to see next is whether it is capable of being properly valued.

A refusal to extend time or to grant an absolute decree for foreclosure of redemption for non-compliance with the strict terms of a preliminary decree has for purposes of Court-fees on a memorandum of first appeal against the final decree been regarded as incapable of valuation and a fixed fee of Rs. 10 only is held payable on it under Cl. VI of Article 17 of Schedule 2 of the Court Fees Act by a Bench of this Court in *Dadnoo v. Somnath* (2). Similarly in *Rai Saheb Beharilal v. Nanhe Lal* (3), where the defendant wanted to get rid of a condition to find a proper security imposed by the Court of first instance, and paid only Court-fee of Rs. 10 on the memorandum of appeal, and the appellate Court rejected the memorandum of appeal as insufficiently stamped, Ismay, J. C., held that the proper Court-fee on a memorandum of appeal by the defendant against the condition imposed was ten rupees. Here also it might be said that the appellant's complaint in second appeal if the lower appellate Court improperly imposed on him a condition as it were that unless he paid ad valorem Court-fee on his memorandum of appeal it would

(2) [1910] 7 N. L. R. 41=10 I. C. 736.

(3) [1901] 14 C. P. L. R. 172.

not adjudicate on his rights as regards the merits of the appeal. In appealing against the imposition of such a condition he must not be made to pay Court-fee either on the price of redemption fixed in the first Court, or on the difference between the Court-fee demanded and the fee paid, but that as the relief, in such cases, is in my opinion not capable of being properly valued the case cannot be brought under Article 1 of Schedule 1 and must therefore fall under the residuary Article 17 of the 2nd Schedule of the Court Fees Act. I need not decide the further question whether it falls under Clause (1) or Clause (6) of that article; whether it comes under the one or the other, fee payable is the same, namely, Rs. 10.

I therefore hold that a fixed fee of Rs. 10 is payable and that the Court-fee of Rs. 2 paid in this Court is insufficient. I accordingly call upon the appellant to make good the deficiency of Rs. 8 within 20 days from this day and direct that the appeal will be set down if this order is complied with by the appellant, for hearing parties; and, in case of failure, for rejection of the memorandum of appeal for non-payment of the deficient Court-fee. The costs of these proceedings will be borne by the parties incurring them.

R.D.

Order accordingly.

A. I. R. 1927 Nagpur 102

KINKHEDE, A. J. C.

Deputy Commissioner, Akola—Applicant.

v.

Gurupratapsingh—Non-Applicant.

Civil Reference Decided on 16th August 1926, made by the Deputy Commissioner, Akola, on 27th August 1926.

Berar Municipal Law (1886), S. 41 (1) A (b) — Notification No. 456, dated 29th April 1913 — Effect—C. P. Municipal Act (2 of 1922).

The operation of the Notification 456, dated the 29th April 1913, is not subject to the maximum of Rs. 500 imposed by proviso 1 to R. 1 of the Hyderabad Residency O. 112, dated the 18th March 1899. [P 104, C 2]

M. B. Niyogi—for Applicant.

A. V. Khare—for Non-Applicant.

Kinkhede, A. J. C.—This is a reference made by the Deputy Commissioner, Akola, under S. 83 (2) of the Central Provinces Municipalities Act (Act 2) of 1922 as applied to Berar by Notification No. 58-I, dated the 22nd January 1924 of the Government of India, Foreign and Political Department, of the Governor General in Council. It arises out of an appeal preferred by non-applicant Gurupratapsingh proprietor of Gulabrai Har-dayal Ginning and Pressing Factory, Basim. I may briefly state the circumstances which necessitated this reference.

Within the limits of the Municipal Committee of Basim the non-applicant has a ginning and pressing factory. A tax on professions and trades was imposed by the Municipal Committee under the authority of the Residency Order No. 112, dated the 18th March 1899, under S. 41 sub-S. I-A (b) of the Berar Municipal Law of 1886, with effect from the 1st April 1899, on all traders practising their calling within the Municipality. Consequently the non-applicant's income from all trades including the trade of ginning and pressing cotton became taxable under the said order. By proviso 1 of R. 1 of the said order Rs. 500 per annum was fixed as the maximum tax leviable from a trader. By Provisos 2, 3 and 4 certain deductions and exclusions were ordered but with them we are not concerned for the purposes of the present reference.

In the year 1913 the same Municipality with the previous sanction of the Chief Commissioner conveyed by Notification No. 456, dated the 29th April 1913, directed the imposition with effect from 1st April 1913 of a new tax on the ginning and pressing of cotton under S. 41 (1) A (b) of the Berar Municipal Law of 1886 to be levied from all persons carrying on within the limits of the Basim Municipality the trade of ginning of cotton and pressing of the same into bales. This new tax was levied on the outturn of the factory and is locally known as tax on bales and bojas, whereas the old tax is known as a tax on profession and trades technically called dhandepatti. When this new tax was imposed the Municipality with the sanction of the Chief Commissioner exempted so much of the income of a trader as was taxable under the tax on ginning and pressing of cotton from the old tax on

professions and trades. This evidently was for avoiding double taxation of the same income under several heads. There was some change in the rates to be levied with effect from 1st of April 1924 as the result of subsequent resolutions and notifications.

For the year 1924-25 the non-applicant had to pay : (1) Rs. 90, on account of the tax on professions and trades, leviable under the Residency Order No. 112, dated the 18th March 1899, and (2) Rs. 1,057 on account of the tax on ginning and pressing of cotton under the Notification No. 456, dated the 29th April 1913. These payments which amounted to Rs. 1,147 were made by him under protest. He therefore applied for a refund of Rs. 647 to the Municipal Committee on the ground that the maximum of Rs. 500 fixed by Proviso 1 to R. 1 of the Residency Order No. 112, dated the 18th March 1899, was applicable to the new tax imposed under Notification No. 456, dated the 29th April 1913, also. The application was rejected by the Municipal Committee by an order dated the 29th June 1925. The non-applicant went up in appeal to the Deputy Commissioner under S. 83 of Act 2 of 1922 as applied to Berar. When the matter came up for hearing before the Deputy Commissioner he called upon the Municipal Committee to show cause why the refund asked for should not be ordered to be made. After hearing the arguments he apparently thought that the matter was not clear and he entertained reasonable doubt, and has consequently referred the point of the applicability of the limit of the maximum tax of Rs. 500 to the new tax for the decision of this Court.

Very elaborate arguments have been addressed at the Bar before me. It will be noticed that the non-applicant does not deny his liability to be taxed separately under the Residency Order No. 112 of 1899 and the Notification No. 456 of 1913 as amended by Notification No. 1609-784-VIII of 1923. His case before the Deputy Commissioner was a simple one, namely that the notification by which the new tax was levied must be read subject to Proviso 1 of R. 1 of the *Hyderabad Residency Order* No. 112 of 1899; whereas the contention of the Municipal Committee was that Proviso 1 to R. 1 of the Residency order does not apply to the new tax imposed by the

notification of 1913 in the absence of express words to that effect. In my opinion the contention of the Municipal Committee is correct. There is nothing in the Notification No. 456 of 1913 which leads me to think that the Municipal Committee intended to incorporate into it the limit fixed by 1st proviso to R. 1 of the Residency Order No. 112 of 1899. Where it is clear that the object of the notification imposing the new tax was to secure increased income by taking as the basis for the taxation the total outturn of a ginning or pressing factory instead of its profits, one cannot impute to the Municipal Committee in the absence of express words to that effect an intention to import into it any limitations as to the maximum tax so leviable.

While applying Act 2 of 1922 to Berar, sub-Ss. (6) and (7) were added to S. 66 of the Act by the Government of India's aforesaid Notification No. 58-I, dated the 22nd January 1924. Sub-S. (6) directs that any tax imposed in a Municipality before the date on which this Act comes into force shall continue in operation notwithstanding that it is not a tax specified in sub-S. (1); and sub-S. (7) says that the amount or rate of a tax to which sub-S. (6) applies may not be varied by the Municipal Committee. S. 66 of Act 2 of 1922, so amended, now takes the place of old S. 41 of the Berar Municipal Law of 1886, and we must therefore look to the new section for determining the question under reference and not to the old S. 41. All taxes levied by the Municipalities in Berar, whether they be specified under sub-S. (1) of S. 66 or not, must, by virtue of sub-S. (6), be deemed to be legally and separately leviable by them. I am not at all impressed by the argument of the non-applicant based upon the use of the singular "a tax" in S. 66 (1), Cls. (a) to (d) and (h) to (p) of Act 2 of 1922 in view of sub-S. (6) added by the Government of India while extending the Act to Berar. Moreover there is nothing in the section to prevent the Municipal Committees from taxing every calling, trade, profession, etc., separately.

Sub-section (2) of S. 66 of the said Act further shows that the Local Government may regulate the imposition of taxes and impose maximum amounts or rates for any tax. The position therefore is this : We have now :

A general tax on professions and trades levied under *Hyderabad Residency Order No 112 of 1899* fixing Rs. 500 as the maximum amount payable by operation of Proviso 1 to its Rule No. 1; and

A special tax on ginning and pressing of cotton where no such maximum is expressly fixed.

By exempting so much of the income of a trader as is assessable to the special tax on ginning and pressing of cotton from payment of the general tax on professions and trades, the Municipal Committee must be deemed to have abolished the general tax to that extent with the sanction of the Local Government as required by law. This shows that the Municipal Committee wanted to give a limited concession only and did not think it proper to incorporate in the notification imposing the special tax any further concessions by fixing the limit of the maximum of Rs. 500 which applied to the old general tax, nor was the permission of the Local Government sought to make the special tax also subject to the same proviso as the general tax. Moreover sub-S. (7) gives the Committee no power to vary the amount or rate of the tax; to say that the special tax is subject to the maximum of Rs. 500 tantamounts to varying the amount of the tax.

To my mind the basis of taxation under the Residency Order 112 of 1899 was fundamentally different from the basis taken for the imposition of the special tax on ginning and pressing of cotton. In one, the tax is to be levied on the net profits of the profession; in the other it is to be calculated on the outturn of bolls and bales of cotton ginned or pressed in any factory of the trader. The evident object was to realize larger income from the latter special tax than was made from the general tax. The new special tax made no allowance for any deductions on account of losses, etc., as the former general tax did. The experience of the Municipality apparently was that it was cheated out of its income by the traders' pleas of losses being in excess of their profits in the several professions or callings they practised, including one of ginning and pressing cotton, within the limits of the Municipality, and the Municipality wanted to provide a remedy against the same. This circumstance also negatives the application of the maximum limit to the special tax.

For the above reasons my decision on the reference is that the operation of the Notification 456, dated the 29th April 1913 is not subject to the maximum of Rs. 500 imposed by Proviso 1 to R. 1 of the *Hyderabad Residency Order 112*, dated the 18th March 1899, and that the non-applicant is not entitled to claim a refund of Rs. 647 from the Municipal Committee. The papers be returned with a copy of this order.

G.B.J.

Order accordingly.

A. I. R. 1927 Nagpur 104

KINKHEDE, A. J. C.

Mt. Deshrani and another—Defendants—Appellants.

v.

Thakur Kishore Singh and others—Plaintiffs—Respondents.

Appeal No. 365 of 1924, Decided on 14th September 1926, from the appellate decree of the Dist. J., Saugor, D/- 8th May 1924.

(a) *Adverse possession—Possession referable to lawful origin—Burden to prove adverse possession is on party alleging it.*

Where possession is referable to a lawful origin the presumption is that it is acquired lawfully and the burden is on the party asserting adverse possession to prove his case. [P 106, C 1]

(b) *Adverse possession—Nature of possession by one Hindu female entitled to maintenance against another female depends upon quality and extent and her intention—Possession to be adverse, lawful owner must have notice—Adverse possession does not run against a person until he is entitled to possession.*

It is a plain proposition of law that no adverse possession can run against a person until he becomes entitled to possession of the property. An adverse possession for any length of time, against a tenant for life is similarly ineffectual against the reversioner or remainderman whose right to possession only accrues on the death of the tenant for life. *A. I. R. 1925 All. 707. Relied on.* [P 106, C 2]

As regards the nature of possession by one Hindu female entitled to maintenance against another Hindu female in whom the inheritance vests for the time being, the quality and extent of right acquired by adverse possession always depends upon the claim accompanying it and upon the nature of the animus possidendi. The question whether possession is adverse or not is always a question of one's own intention to hold adversely and knowledge of such intention must be brought home to the real owner so as to extinguish his title. *10 N. L. R. 35 and A. I. R. 1924 P. C. 121 (P. C.), Ref.* [P 106, C 1]

(c) *Civil P. C., S. 100—New plea cannot be raised.*

In the absence of any specific pleadings a belated contention cannot be allowed to prevail at the stage of second appeal, if it exposed the plaintiff to the brunt of a new attack at the stage of appeal at the instance of an unsuccessful litigant. [P. 107, C. 1]

(d) *Evidence Act, Ss. 107 and 108—There is no presumption about the time of death—Time must be proved by party concerned.*

When the question is not merely one of death but of death at a particular time there is no presumption as to the time but the party concerned to make out death on a specified date must prove it by evidence : *Case Law Referred to.*

[P. 107, C. 1]

(e) *Practice—Plaintiff's suit cannot be dismissed on the ground of false averment.*

Where plaintiff based his suit on the averment that A was the last male holder but it was found that B and not A was the last holder.

Held : that plaintiff's suit cannot be dismissed on the ground of false averment : 12 N. L. R. 57, Foll. [P. 106, C. 2]

G. G. Subhedar and Shrikhande—for Appellants.

J. Sen—for Respondents.

Judgment.—The appellants took a sale-deed, dated the 22nd August 1917, from the Respondent No. 2, Mt. Baribahu, in consideration of a mortgage debt due under a deed, dated the 7th February 1903, and a cash payment of Rs. 200. Respondent No. 1 who claims to be a reversionary heir entitled to succeed to the estate involved in this litigation, after the death of Respondent No. 2, instituted the suit of which this second appeal has arisen to set aside the said alienation. This suit was filed on 12th December 1922. The plaintiff alleged that Mt. Baribahu's husband Jalamsingh was the last male holder and that she inherited his estate as his widow, and that as she had no legal necessity to incur mortgage debt or to sell the property for the satisfaction of that debt and a cash payment, the alienation was not binding as against him beyond her life time.

Jalamsingh had two brothers Lachhman Singh and Pran Singh. It is common ground that Lachhman Singh died first. While according to plaintiff Pran Singh predeceased Jalamsingh, the defendants' case is that he died after Jalamsingh. Each of these brothers left behind a widow. Rajrani was the widow of Lachhman Singh; she died in 1906. Mt. Shahjadi Bahu was the widow of Pran Singh; she disappeared from the village of residence of the family a few

years after her husband's death; while according to plaintiff she has not returned since then, the defendants contented themselves by asserting that she has not been heard of since she left. Neither party expressly alleged that Shahjadi Bahu actually died or must be presumed to be dead at any particular point of time.

On the evidence on record both the Courts below have come to the concurrent conclusion that Pran Singh was the last male holder of the estate, and that his death took place somewhere in Sambat 1929 corresponding to 1872. This necessarily involved the conclusion that the estate devolved on Pran Singh's widow Mt. Shahjadi Bahu and not on the widows of Lachhman Singh and Jalamsingh who predeceased him. The further question arising out of this position was as regards the nature of the interest which Mt. Rajrani and Mt. Baribahu held in the property inherited by Mt. Shahjadi Bahu as against her during all the period that has elapsed since the latter's disappearance. In short the question was : Was the possession and enjoyment of Rajrani and Baribahu adverse merely to Shahjadi Bahu so as to deprive her of her widow's estate and clothe them with the same, or they prescribed for the larger interest of an absolute owner, which would make their possession adverse also against the plaintiff in his capacity of reversionary heir of Pran Singh's estate. The earliest document on record which shows Mt. Shahjadi Bahu's name against the fields in suit is Exhibit 3 D-3 of Samvat 1930. Presumably she continued to hold the land until her disappearance from the village in Sambat 1935 corresponding to 1878-79, as we find from a remark in Exhibit 3 D-4, a jama-bandi for that year, that possession was ordered to remain with Mt. Rajrani and Mt. Baribahu so that Shahjadi Bahu if aggrieved might go to civil Court. It is not clear that this possession of Rajrani and Baribahu had its origin necessarily in an act of trespass pure and simple and not in an act consistent with their asserting their own position as widows of predeceased coparceners entitled to maintenance out of the family estate.

It was open to the defendants who allege acquisition of a prescriptive title of an absolute owner by Baribahu to prove by the positive and direct evidence of Baribahu, who is still alive, that she pres-

cribed for and acquired an absolute title which must hold good not only against Shahjadi Bahu in the event of her return but also against the reversioners who may be entitled to succeed to the estate on her death. Where possession is referable to a lawful origin the presumption is that it is acquired lawfully and the burden is on the party asserting adverse possession to prove his case. The learned District Judge has drawn an inference from the evidence on record consistently with Hindu notions. As regards the nature of possession by one Hindu female entitled to maintenance against another Hindu female in whom the inheritance vests for the time being, the quality and extent of right acquired by adverse possession always depends upon the claim accompanying it and upon the nature of the animus possidendi. The question whether possession is adverse or not is always a question of one's own intention to hold adversely and knowledge of such intention must be brought home to the real owner so as to extinguish his title.

In the absence of any proved positive assertion of a hostile claim on the part of the two widows Mt. Rajrani and Baribahu, at the time of the commencement of their possession and in the absence of Baribahu's own evidence, it was open to the District Judge to draw the inferences he did and to hold that the nature and quality of Baribahu's possession was not proved to be such as could give rise to the further inference that it was as an absolute owner and that it therefore became adverse as against the present plaintiff also. The case is not taken out of the rule enunciated by Mittra, A. J. C, in *Sheolal v. Mt. Sheoraija* (1). The Privy Council case in *Lajwante v. Safa Chand* (2) is also instructive on this point as regards the nature of interest which a Hindu widow prescribing as a widow acquires and makes good to her husband's estate. Any length of adverse possession against Mt. Shahjadi Bahu could not have therefore set time running against the present plaintiff so long as it is not proved by positive evidence that Mt. Shahjadi Bahu died in a particular year. On the present state of the record it is not possible to hold that limitation began to run against the present plaintiff from any particular date or

year. It is a plain proposition of law that no adverse possession can run against a person until he becomes entitled to possession of the property. An adverse possession for any length of time, against a tenant for life is similarly ineffectual against the reversioner or remainderman whose right to possession only accrues on the death of the tenant for life: *Naunihal Singh v. Alice Georgina Skinner* (3).

The defendants may at the most be said to have proved only an acquisition by Baribahu of merely the widow's interest of Mt. Shahjadi Bahu and nothing further. So long as such interest is not proved to have come to an end by proof of Shahjadi Bahu's death, the plaintiff cannot be said to have become entitled to possession of the property, and the only relief which he can claim under the law is to have it declared that the alienations made by Baribahu are operative only during her own lifetime and not beyond unless they were proved to be justified by legal necessity. The plea of legal necessity raised in the case not being substantiated in the first Court was not made the subject of any specific ground of appeal before the District Judge. The result is that the transaction does not bind the plaintiff as a reversionary heir of Pran Singh's estate, and it was rightly declared as inoperative beyond Baribahu's lifetime.

The argument of the learned counsel for the appellant that the present suit being based on false averment as to Jalamsingh being the last male holder deserved to be dismissed on the finding that Pran Singh was the last male holder. But I am not prepared to uphold this contention in view of this Court's decision in *Loola v. Pyare* (4). The second contention is that in view of the admitted disappearance of Mt. Shahjadi Bahu from 1878, the Courts below should have presumed under the combined operation of Ss. 107 and 108 of the Evidence Act that she was dead at the end of the period of seven years from 1878 and that the plaintiff's claim was, therefore, hopelessly barred by time even when he instituted his former suit of 1908 to set aside the mortgage of the 7th February 1908 or at any rate at the date of the present suit. In the

(1) [1913] 10 N. L. R. 35=23 I. C. 719.

(2) A. I. R. 1924 P. C. 121=5 Lah. 1929.

(3) A. I. R. 1925 All. 707=47 All. 803.

(4) [1915] 12 N. L. R. 57=33 I. C. 497.

absence of any specific pleadings on the point of either actual or presumed death, I do not think I should allow the present belated contention to prevail at the stage of second appeal. It exposes the plaintiff to the brunt of a new attack at the stage of appeal at the instance of an unsuccessful litigant: *Nathu v. Umedmal* (5). The law on the point of such presumption is also clear. There is express authority for the view that when the question is not merely one of death but of death at a particular time there is no presumption as to the time, but the party concerned to make out death on a specified date must prove it by evidence: *Hanumanulu v. Lachchamma* (6); *Jayawant v. Ramchandra* (7) and *Parsoo v. Munnalal* (8); see also *Muhammad Sharif v. Bande Ali* (9); *Narki v. Phekia* (10); *Veeramma v. Chenna Reddi* (11) and *Mairoj Fatima v. Abdul Wahid* (12). It is held in *Gopal Bhimaji v. Manaji Ganuji* (13) that the date of a person's death must be proved like any other fact by the party who is interested in establishing that he died on or before a particular date: see also *Lalchand Marwari v. Mahant Ramrup Gir* (14). Since the defendants depended upon the plea of adverse possession for their success it was necessary for them first to allege and then to prove that Mt. Shahjadi Bahu died in a particular year. Not having done so they are not entitled to ask me to make even the limited presumption that she was dead at the time when the question was raised much less to presume that her death took place more than 12 years before the institution of the present suit.

Now one more position taken up by the defendants-appellants which is based on the recognition of Baribahu as an absolute occupancy tenant, has remained to be considered. I think this conten-

tion cannot stand. As it has not been alleged and proved in this case that the landlord dealt with Baribahu independently of her position as a dependant or representative of the family of Pran Singh, Baribahu could not acquire the status of an absolute occupancy tenant by prescription or by recognition of the landlord. The only effect of the recognition was to raise a personal estoppel against the landlord in the matter of ejecting Baribahu as a trespasser. It did not confer on her any higher and new status so as to work a forfeiture of the plaintiff's reversionary interest in the estate of Pran Singh after Baibahu's death.

On the view taken by the Courts below that Mt. Baribahu acquired by adverse possession only Mt. Shahjadi Bahu's life interest as a Hindu widow in the estate of Pran Singh and as such her possession was not adverse to the present plaintiff, the decision that her alienation will not operate or be binding against plaintiff after her death is correct and must be upheld. The appeal, therefore, fails and is dismissed with costs.

G.B.J.

Appeal dismissed.

A. I. R. 1927 Nagpur 107

KINKHEDE, A. J. C.

Kaliram Kunbi—Plaintiff—Appellant.
v.

Bajilal—Defendant—Respondent.

Second Appeal No. 336 of 1925, Decided on 14th July 1926, from the decision of the Addl. Dist. J., Betul, D/- 7th May 1925, in Civil Appeal No. 11 of 1925.

(a) *Hindu Law—Joint family—Separation—Mere cesser of commensality and residence is not sufficient to constitute separation.*

Mere cesser of commensality and residence is not sufficient to constitute 'separation' in the eye of law. There must be a disruption of the joint family status; and this could be only by a partition, either made by the father in his own lifetime of coparcenary property, or even of his own separate or self-acquisitions, or by the sons in their capacity as co-owners, after their father's death. [P. 108, C. 2]

(b) *C. P. Tenancy Act (1920), S. 11—Mere separation in mess and residence of a son is not sufficient to cause exclusion from inheritance if there is no separation in estate.*

The personal law of the Hindus has no doubt to be administered in dealing with cases of in-

(5) [1908] 33 Bom. 35=10 Bom. L. R. 768.

(6) [1904] 14 M. L. J. 464.

(7) [1915] 40 Bom. 239=33 I. C. 484=18 Bom. L. R. 14.

(8) [1916] 13 N. L. R. 16=39 I. C. 21.

(9) [1911] 34 All. 36=11 I. C. 474=8 A. L. J. 1052.

(10) [1909] 37 Cal. 103=11 C. L. J. 138=5 I. C. 709=14 C. W. N. 341.

(11) [1912] 37 Mad. 440=16 I. C. 43=23 M. L. J. 443.

(12) A. I. R. 1921 All. 175=43 All. 673.

(13) A. I. R. 1923 Bom. 163=47 Bom. 451.

(14) A. I. R. 1926 P. C. 9=5 Pat. 312.

heritance to occupancy tenancy holdings ; but it does not follow that the rule of Hindu Law that a 'joint' son excludes a 'separated' son must hold good even where the separation consists only in mess and residence and not in estate.

[P. 108, C. 2, P. 109, C. 1]

(c) *Landlord and tenant—Surrender by occupancy tenant—Hindu joint family—Sons surrendering the holding after father's death—A son separate in mess and residence but not in estate cannot claim his share from landlord—Landlord cannot claim actual physical possession until partition.*

Where after the death of a Hindu father his sons surrendered the holding to the landlord in satisfaction of the debts due from their father :

Held : that a son who is merely separated in residence and mess, but not in estate, cannot claim his share but the landlord would not be entitled to actual physical possession of the holding until partition among the sons. He could only enjoy what he could legally get by a surrender from a fractional body of co-tenants.

[P. 109, C. 2]

S. B. Gokhale—for Appellant.

M. B. Niyogi—for Respondent.

Facts—This is an appeal arising out of a suit brought by the plaintiff malguzar lambardar of monza Nadpore to recover possession of fields Nos. 5 bate 6 and 6 bate 3 area .57 and 2.60 acres respectively situate therein on the ground that the defendant has been in wrongful possession from 1923-24.

The plaintiff admitted that the fields belonged to Mansa, father of the defendant, but pleaded that he acquired the land by virtue of a deed of surrender, Ex. P. 2, given by the five brothers of the defendant in respect of the entire holding consisting of fields Nos. 5 and 6, of which the land in dispute is a part, in satisfaction of debts due on a decree from the father of the defendant that the defendant was ill at the time of the surrender, and could not therefore join in the surrender, but had given his consent to the surrender ; that since the surrender he was in possession till the date of dispossession. He also pleaded that the defendant and his brothers sold the crops of Nos. 5 and 6 to him at the time of the surrender under the deed Ex. P. 1. He admitted that all the sons of Mansa including the defendant were joint at least till the date of the surrender, i. e., 8-9-1922.

The defendant appellant denied knowledge about the surrender and the alleged consent. He also denied the sale of the crops and pleaded that no oral evidence could be given to prove consent ; that in the year 1919 Mansa partitioned his pro-

perty and in that partition 6 acres of land out of Nos. 5 and 6 fell to his share ; that he was in possession of the area since then ; that the land in suit formed part of that share ; that even supposing that he was joint with his brothers at the time of the surrender, the deed was not binding on him as he gave no consent and as the surrender was partial and therefore, illegal ; that he had offered rent to the plaintiff for the last two years but the latter refused to take it.

The plaintiff-respondent denied the partition and replied that the land in suit was the joint property of the defendant and his brothers at the time of the deed of surrender. He denied all other adverse allegations.

The lower Court found that there was the surrender, that the defendant gave his consent to the surrender, that such consent could pass his share, that the surrender was valid, that oral evidence could be given to prove the consent, that there was no partition, that the land in suit did not go to the share of the defendant, that the plaintiff was dispossessed as alleged in the plaint, that the defendant had remitted the land but the plaintiff had refused it, but that fact did not affect the claim of the plaintiff.

On these findings the claim was decreed.

Judgment.—I am asked in this second appeal to infer and hold in view of the finding of the lower appellate Court to the effect that Bajilal was living separately and messing separately from his father and brothers for several years during the father's lifetime ; that he was 'separated from', and the other brothers were 'joint with', the father at the time of the latter's death. But it is laid down in several cases that mere cesser of commensality and residence is not sufficient to constitute 'separation' in the eye of the law. There must be separation of interest, or, in other words, there must be a disruption of the joint family status ; and this could be only by a partition, either made by the father in his own lifetime of co-parcenary property, or even of his own separate or self-acquisitions, or by the sons in their capacity as co-owners, after their father's death. Here, admittedly, no such partition has taken place either during the father's lifetime, or after his death. The personal law of the Hindus has no doubt to be administered

in dealing with cases of inheritance to occupancy tenancy holdings; but it does not follow that the rule of Hindu Law that a 'joint' son excludes a 'separated' son must hold good even where the separation consists only in mess and residence and not in estate. It is no doubt the privilege of a Hindu father, at any time to separate his sons, or any of them, from himself, and, from his other sons, and to allot to them or him, as the case may be, a share or shares in order that they or he shall be separate thereafter, from himself and from one another; but there is no presumption that he had done so in every case. The question has to be decided on the facts of each case. Here the so-called separation stopped with separating Bajilal in mess and residence only. No doubt Bajilal asserted that he was assigned the plot in dispute as his own separate share, but on the evidence it has been held that he failed to prove that it was assigned to him exclusively as his own share. In short there was no such separation or disruption of the interest of Bajilal or of the family property, as to constitute him a separated son of Mansa. I am not therefore prepared to accept the contention of the learned pleader for the appellant based on the rulings of this Court reported in *Chudaman Singh v. Sikharam* (1); *Atmaram v. Lala* (2) and *Yenka v. Dharma* (3); that the other five sons of Mansa had a preferential right to succeed to his occupancy holding to the exclusion of Bajilal.

The cases in which the joint or reunited son or member was allowed to exclude the separated son or member were cases wherein either coparcenary property was involved or the separate or self-acquisitions of the father were voluntarily treated by the father as joint property and partitioned as such by him amongst his sons, and the separated son having been given his share by the father during his own lifetime, had no longer any claim to the rest of the property which he allotted to the rest of the sons or retained for them and himself jointly. Admittedly nothing of this kind has happened in this case, nor has Bajilal done anything to lose his right of inheritance. It is not the appellant's case that he is excluded from

inheritance on any other ground. It therefore follows that Bajilal was legally entitled to succeed equally with the rest of the sons to his father's tenancy land in suit.

The next question is what has the plaintiff got by virtue of the surrender. Reliance is placed on his behalf on *Shersingh v. Kalusingh* (4) and it is urged that he must be allowed to enjoy what he could legally get, by a surrender from a fractional body of co-tenants. This is recognized in the aforesaid reported ruling and I must give effect to this contention by declaring that he is so entitled. I am given to understand that the defendant taking advantage of the decision appealed against has begun to disturb the plaintiff's possession of the rest of the land of which the latter had secured peaceful possession from the five sons who surrendered the tenancy holding. It is no doubt true that under Hindu Law the plaintiff's position would at the most be that of a transferee from some of the co-owners, and as such he is not entitled to actual physical possession of the alienated portion so as to disturb the enjoyment of the property by the rest of the coparcenary. But inasmuch as the five sons of Mansa have inherited the holding as tenants-in-common and were on the defendant's own admission in separate enjoyment of definite portions of common property (no matter they may not be such portions as actually or correctly represented their separate shares) not necessarily by way of partition, but all the same it could be by way of an arrangement for mutual convenience and separate enjoyment, the defendant is bound under law to respect that arrangement until regular partition. The alienee is under the ruling reported in *Jagannath v. Ramprasad* (5) entitled to the benefit of the arrangement so long as there is no regular partition and he cannot be disturbed by the defendant in the enjoyment of the portion already in his possession. No doubt the question has only an academical interest, but since the defendant has by his subsequent action invited such a decision, I have given it in order to safeguard the interest of the plaintiff pending regular partition of the holding which he may be advised to obtain.

(1) [1900] 13 C. P. L. R. 137.

(2) [1911] 7 N. L. R. 36=10 I. C. 733.

(3) [1913] 9 N. L. R. 150=21 I. C. 597.

(4) A. I. R. 1925 Nag. 124=22 N. L. R. 17.

(5) [1918] 14 N. L. R. 101=46 I. C. 272.

As the surrender has not given to the plaintiff a right to disturb the defendant in the enjoyment of the six acres in dispute until partition, and it has not been shown that his possession over it was wrongful, the appeal must fail and is dismissed with costs. The decree will embody the declaration made in paragraph 2 above.

G.B.J.

*Appeal dismissed.***A. I. R. 1927 Nagpur 110**

FINDLAY, O. J. C.

Piluram—Plaintiff—Appellant.

v.

Mahadeo—Defendant—Respondent.

Second Appeal No. 357 of 1924, Decided on 22nd August 1925, from a decree of the Dist. J., Nagpur, D/- 10th May 1924, in Civil Appeal No. 34 of 1924.

C. P. Tenancy Act (11 of 1898), S. 41—On receipt of notice by tenant of the intended transfer by tenant, landlord must intimate his desire to purchase and must apply for fixing the value to revenue officer — Otherwise the transfer becomes unavoidable.

Section 41 contemplates that within the period of one month from the receipt of notice by an occupancy tenant intimating his intention to transfer his holding the landlord must intimate to the tenant his desire to purchase the absolute occupancy right. If the price cannot be amicably settled the landlord must apply to a revenue officer and have the value fixed. If the tenant is still reculant he must then bring a regular suit within the period prescribed by law for possession of the holding on payment of the price so fixed. If the landlord fails to take the effective steps, the transfer becomes unavoidable at his instance: 14 C. P. L. R. 162 and 1 N. L. R. 6, *Foll.* [P 111, C 1]

*M. B. Kinkhede and M. K. Padhye—*for Appellant.

*M. R. Bobde and R. N. Padhye—*for Respondent.

Judgment. — The plaintiff-appellant Piluram is an eight-anna share-holder and lambardar of Mauza Pachkhedi (Nagpur). He sued the defendant-respondent Mahadeo for possession of absolute occupancy field No. 11 in that village. His case was that he was entitled to possession under a deed of surrender, dated 14th July 1922, executed by the tenant Jhibal in his favour. There was, moreover, in existence a previous sale deed in favour of the plaintiff's sons benami on his account, dated 7th Feb-

ruary 1922. The defendant-respondent Mahadeo's case was that he had acquired the field from Jhibal, the tenant, by a sale-deed, dated 2nd May 1917, and that previously thereto Jhibal had given the requisite notice to the plaintiff on 23rd May 1916 with reference to S. 41 (2) of the Tenancy Act of 1898. The plaintiff admitted having received this notice, and it is further clear that he sent a reply thereto declaring his intention of acquiring the field himself after fixation of the value by the revenue officer. The said reply (Ex. D-2) also contained a definite statement that he had applied to the Collector thereanent. It is admitted now that this application was never made by the plaintiff.

The Munsif held that the notice given by Jhibal to the plaintiff on 23rd May 1916, was a valid notice; that the mere fact of the plaintiff sending the reply he did to the notice, without taking effective steps to have the value of the field fixed, was no bar to Jhibal's transfer in favour of the defendant and that the latter had duly acquired the field by purchase from Jhibal under the sale-deed, dated 2nd May 1917. The plaintiff's suit was accordingly dismissed, and the appeal to the District Judge by the plaintiff has also failed.

The learned District Judge has recorded a careful and detailed judgment in the case. The main question before me in this appeal concerns the construction of S. 41 (3) of the Tenancy Act of 1898. On behalf of the plaintiff-appellant it has been urged that the mere fact of his sending the reply (Ex. D-2), which he did to Jhibal, was in itself sufficient to disentitle the defendant-respondent's vendor from proceeding with the sale in his favour. It is urged that, under the provision of law quoted, there was no obligation on the landlord to apply for fixation of the value of the holding to the Revenue Officer. The decision in *Kodubakhsh v. Bishnu* (1) was quoted in support of this contention, but it, in reality, gives no help to the appellant. I have been referred in this connexion to S. 6 (4) of the C. P. Tenancy Act of 1920. It is undoubtedly true that the said provision is more happily and specifically drafted, and, moreover, the second Schedule thereto contains a provision giving one year's limitation for

(1) [1906] 2 N. L. R. 27.

an application by a landlord to fix the value of the holding. Although the new Act may be more happily and specifically drafted, the question before me is whether S. 41 of the previous Act bears the construction which both the lower Courts have put upon it.

For my own part I can see not the slightest reason for differing from the view which was taken by Ismay, J. C., in *Bharatsingh v. Dhansingh* (2). There it was remarked as follows :

Section 41 of the Tenancy Act is not very happily worded but it appears to contemplate that within the period of one month from the receipt of notice the landlord must intimate to the tenant his desire to purchase the absolute occupancy right. If the price cannot be amicably settled the landlord must apply to a revenue officer and have the value fixed. If the tenant is still recusant he must then bring a regular suit within the period prescribed by law. If the holding has been already sold the suit would be a suit to enforce a right of pre-emption.

Again, in *Seetaram v. Ramdayal Marwari* (3), Ismay, J. C., further held that a suit by a landlord to enforce his right of pre-emption under S. 41 of the Tenancy Act is governed by Art. 10 of the Limitation Act. It was also pointed out that in the meantime it was incumbent on the landlord to exercise due diligence in having the value of the holding fixed by a revenue officer. For my own part, I can see not the slightest reason for differing from the view taken by Ismay, J. C., in these two cases. The construction I am asked by the appellant to place on S. 41 (3) of the 1898, Tenancy Act, seems to me an impossible one. It has seriously been suggested that under the provision as drafted the tenant might conceivably apply for the value to be fixed. Even if we make such an assumption, the only reasonable conclusion could be that the tenant was applying in pursuance of an understanding with the landlord and on his behalf.

But the provision clearly, in my opinion, must be read as contemplating the landlord making an application to the revenue officer within the time contemplated. Sub-Cl. (a) of the provision clearly requires the claim to purchase as the main and vital item, and a secondary and consequential incident is that the landlord must apply to the Revenue Officer to have the value fixed unless indeed he can arrive at an agreed upon

value with the tenant privately. Any other construction of this provision would strain the language therein to a point which would be utterly unreasonable. Moreover, in the present case it is perfectly clear from the contents of the reply (Ex. D-2) given by the landlord that he fully realized the duty incumbent upon him, for, as I have already shown, this reply contains a definite, though incorrect, statement that he had already applied to the revenue Court for the fixation of value. Thus, in 1916 what the plaintiff had was a right of pre-emption and he allowed that right to lapse by default in view of his failure to take effective steps to comply with the provision quoted in the way of asserting and substantiating the said right. It follows therefrom that the transfer made in favour of the present defendant by Jhibal was not voidable at the instance of the plaintiff and is now binding on him.

Reference has been made to the copy of the judgment in Civil Suit No. 48 of 1920 (Ex. P-3), in which Piluram sued Jhibal for arrears of rent. The present defendant sought to intervene, but his application was disallowed. I need hardly point out that this decision in a rent suit before the Additional Munsif, Umrer, is in no way binding on the defendant-respondent and in no way prejudices his position in the present case. Likewise, the fact that the plaintiff has declined to accept him as a tenant and has refused to receive rent payments from him, is utterly beside the point. It follows therefrom that on 2nd May 1917 the defendant had a valid title transferred to him by Jhibal in the field in question, and it equally follows that Jhibal, in his turn, had no valid title to transfer to the plaintiff by either the sale-deed or the surrender of 1922.

I may point out further that the position of the plaintiff in this appeal, if pushed to the logical conclusion, leads, in reality, to a reductio ad absurdum. His right in 1916 amounted to nothing more than one of pre-emption. Beyond sending the reply he did to Jhibal he took no effective steps to enforce his right. He now, in reality, is claiming a right to possession forthwith and, in effect, thereby, he abandons his right to pre-emption. In the circumstances of the case the tenant Jhibal having fully

(2) [1901] 14 C. P. L. R. 162.

(3) [1905] 1 N. L. R. 6.

complied with the provision of the law in 1916 and the plaintiff having failed to enforce the right which remained to him under S. 41 of the Tenancy Act, it is obvious that Jhibal had full power and title to make the transfer he did under the sale-deed of 2nd May 1917 in favour of the defendant. *Pari passu* the plaintiff could not acquire any title under the two documents of 1922 executed by the late tenant.

I fully concur in the careful findings arrived at by the learned District Judge and the present suit was obviously a hopeless one. The appeal fails and is dismissed with costs.

R.D.

Appeal dismissed.

* A. I. R. 1927 Nagpur 112

HALLIFAX AND PRIDEAUX, A. J. CS.

Nagappa—Applicant.

v.

Balkisandas—Non-Applicant.

Civil Revision No. 211-B of 1925,
Decided on 18th November 1926.

* *Civil P. C., O. 21, R. 71 and S. 47—Order under R. 71, O. 21, is appealable: 7 N.L.R. 134, Overruled.*

An order passed under R. 71 of O. 21 is a decree, and also an order passed under S. 47, that an appeal against it does lie: 7 N. L. R. 134 Overruled; 25 Cal. 99; 18 Mad. 439; A.I.R. 1922 All. 200 (F. B.), and 36 Bom. 329, *Foll.*

[P 112, C 2]

D. T. Mangalmoorti and *V. R. Dhoke*
—for Applicant.

M. B. Niyogi—for Non-Applicant.

Hallifax, A. J. C.—The question referred to the Bench in this case is whether an appeal does or does not lie against an order, passed under R. 71 of O. 21 of the Civil Procedure Code, that a defaulting bidder at a sale in execution shall pay to the decree-holder the excess of his bid over the highest bid at the re-sale. The answer is undoubtedly that an appeal does lie; the reference was made necessary only by the official publication of the judgment in *Parbat v. Bindraj* (1). In that case *Drake-Brockman, J. C.*, held that a person against whom such an order had been passed could file a regular suit to set aside the order and to recover the money realized from him; if he can bring a separate suit for the purpose he cannot, of course, appeal against the order.

An order under R. 71 of O. 21 is not one of those mentioned in O. 43 as ap-

(1) [1911] 7 N. L. R. 134=12 I. C. 360.

pealable. But its very nature, as compared with the orders there mentioned, makes it highly improbable that it would not have been included among them, unless it were appealable otherwise. And it certainly is appealable otherwise, first because it completely satisfies the definition of a decree given in S. 2 of the Civil Procedure Code, and also because there can be no doubt about its being a determination of a question within S. 47 of the Code.

It has apparently never been suggested that the question decided by such an order does not relate to the execution of the decree. What is held in the judgment already cited and in *Deoki Nandan Rai v. Tapesri Lal* (2), decided by the Allahabad High Court in 1892, is that the defaulting bidder is not a representative of the judgment-debtor in the suit. It is hard to see how he can be said not to be representative in interest of the judgment-debtor when the liability of the judgment-debtor, to the extent of the amount he is ordered to pay, has been transferred to him and the decree is executed against him; he is not only the representative of the judgment-debtor, but himself the judgment-debtor.

That is the view taken by all the High Courts in India, including that of Allahabad, where the decision in *Deoki Nandan Rai v. Tapesri Lal* (2) has been over-ruled several times. The matter was specifically considered in the Calcutta case of *Kali Kishori Deb v. Guru Prosad* (3), and the Madras case of *Amir Baksha Sahib v. Veekatachala Mudali* (4), and by a Full Bench of the Allahabad High Court in *Sita Ram v. Tanki Ram* (5), and in *Gangadas Dayibhai v. Bai Suraj* (6), the Bombay High Court heard and allowed a second appeal on the point without any question.

The answer to be returned to the Court that made the reference is that an order passed under R. 71 of O. 21 of the Civil Procedure Code is a decree, and also an order passed under S. 47 of the Code, so that an appeal against it does lie.

G.B.J. Reference answered in affirmative.

(2) [1892] 14 All. 201 = (1892) A. W. N. 74 (F. B.).

(3) [1897] 25 Cal. 99=2 C. W. N. 408.

(4) [1895] 18 Mad. 439=5 M. L. J. 206.

(5) A. I. R. 1922 All. 200=44 All. 266 (F. B.).

(6) [1911] 36 Bom. 329 = 14 I. C. 777 = 14 Bom. L. R. 250.

A. I. R. 1927 Nagpur 113

HALLIFAX AND MITCHELL, A. J. CS.

Jiji Bai—Plaintiff—Appellant.

v.

Chowdhary Ratan Singh and another—Defendants—Respondents.

First Appeal No. 84 of 1925, decided on 22nd October 1926, from the decree of the Addl. Dist. J., Narsinghpur, D/-7th May 1925, in Civil Suit No. 17 of 1924.

(a) *Registration Act, S. 49*—An unregistered partition deed, though inadmissible to prove its terms, is admissible to prove factum of partition; but separate possession is always provable by independent evidence—The facts of partition and separate possession are not part of "transaction" within S. 49 or of "disposition" within Evidence Act S. 91.

An unregistered partition deed is admissible to prove the factum of partition, but its terms cannot be proved: *A. I. R. 1924 Mad. 292*; *A. I. R. 1924 Pat 641*; 43 *Mad. 244*, *Rel. on.*

Where a deed of partition is unregistered, the combined operation of S. 49, Registration Act, and of S. 91, Evidence Act, would be to shut out all evidence to prove the terms of the deed; still separate status and separate possession are provable by other independent evidence; 41 *Bom. 466*; 44 *Bom. 881*, *Rel. on.*

Though a deed of partition is unregistered, the fact of partition and the fact of separate status and separate possession are provable, the reason being that these facts are not part of the "transaction" as contemplated by S. 49 of the Registration Act or of the "disposition" as contemplated in S. 91 of the Evidence Act.

[P 114 C 1 2]

(b) *Hindu Law—Partition—Suit by granddaughter for her father's share against his brothers—Father's possession of specific property not proved—She can still demand equivalent of his share.*

In a suit by a granddaughter for her father's share who died separate against his brothers, if she is unable to prove the specific items of property held by her father, she is entitled to demand that the equivalent of his share shall be divided and given to her.

[P 115 C 1]

B. K. Bose and K. B. Gupta—for Appellant.

Hari Singh Gour, R. R. Jayavant and J. Sen—for Respondent.

Mitchell, A. J. C.—The following genealogical tree shows the relationship of the parties: (See p. 114 for the genealogical tree.)

The dispute relates to the property of R. B. Chaudhri Pulandar Singh, and is between the surviving descendants by his first wife, Pahup Singh and Ratan Singh, who are the defendants-respon-

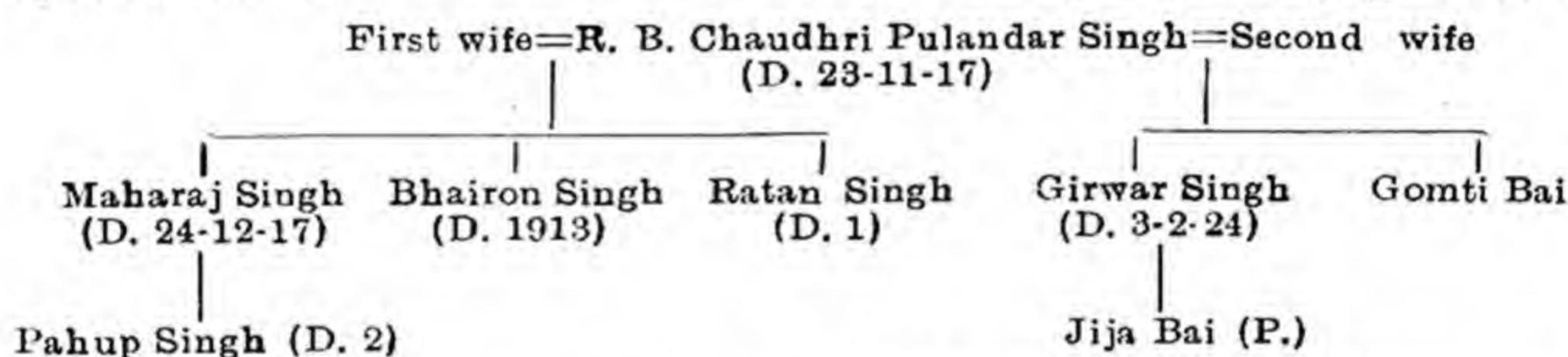
dents, and his grandchild by the second wife, Mt. Jiji, who sued for her father's share and was represented by her aunt Mt. Gomti Bai. The case for the plaintiff Jiji is that Pulandar Singh, shortly before he died in 1917, broke up the coparcenary consisting of himself and his three surviving sons Maharaj Singh, Ratan Singh and Girwar Singh and divided the landed property among them, giving to each a list of the property allotted to him; and that this partition of the property was completed in July of the following year, when the house-hold property and moveables were divided up and lists made out of the various shares. The plaintiff alleged that her father Girwar Singh remained in separate possession of his share until his death, on 3/2/24, but the defendants, Ratan Singh and Pahup Singh have taken possession of the whole estate, and are asserting that she has no interest. She based her claim distinctly on Girwar Singh's separate status and separate possession at the time of his death, and gave her cause of action as arising on his death and on her dispossession by the defendants and their denials of her title. The case for the defendants was that there was no partition, and that Pulandar Singh before his death only indicated how partition should be made in the event of his sons separating.

The suit has not been decided on its merits and the plaintiff, so far, has lost her case entirely on a finding that the two lists of property are deeds of partition, that they should have been registered, but being unregistered they cannot, by the operation of S. 49 of the Registration Act, affect the property; and that by the operation of S. 91 of the Evidence Act no other evidence of the partition can be adduced. The lower Court had framed an issue, No. 4, covering the question of the separate possession of the parties (and, presumably of Girwar Singh, the plaintiff's predecessor) but it held merely that "the alleged partition cannot be proved" and found the issue "in the negative".

During the preliminary stages of the trial the lower Court treated the issues relating to the admissibility of the partition lists as preliminary issues and recorded findings as already indicated, on 17-3-25. On 26-3-25 the plaintiff protested, claiming that she should be

allowed to prove that the family was divided when Girwar Singh died, and to file lists of the property to which she is entitled. The lower Court held that the plaint was based on a definite partition which could not be proved, and that it would be improper to allow the plaintiff to amend her pleadings at that stage.

During argument in this appeal three distinct points emerged, relating to (1) the right of the plaintiff to prove the separate status and possession of her father; (2) the admissibility of the lists as evidence of the partition; and (3) the right of the plaintiff to ask for some alternative relief if she succeeds in proving her father's separate status, but fails to establish the identity of the property in his possession. The finding of the lower Court, that the lists are inadmissible in proof of the terms of the partition, has not been challenged, though it seems open to doubt.



The view taken by the lower Court on the first point is clearly too narrow. The gist of Mt. Jiji's case is given in paragraphs 10 to 14 of the plaint, which show that her claim is based on the separate status and possession of her father from 1917 or 1918 till his death on 3/ 2/ 24. The partition is not the logical basis of her claim, but is only an explanation of how it came about that Girwar Singh died a separate member of the family. All that the combined operation of S. 49 of the Registration Act and of S. 91 of the Evidence Act would effect in this case would be the complete shutting out of all the terms of that particular transaction of partition. In other words, it would prevent the plaintiff from proving that in that partition certain property was allotted to her father. But it would not prevent her from showing by other evidence that her father died separate from the rest of the family and in separate possession of certain property. These facts are not part of the "transaction," as contem-

plated in S. 49 of the Registration Act, or of the "disposition" as contemplated in S. 91 of the Evidence Act. The separate status and separate possession of her father was a continuing phenomenon. It may have had its origin in the alleged partition of 1917 and 1918, but a finding that these partitions may not be proved will not prevent the plaintiff from proving all that is necessary in her case — that her father died separate and in separate possession of his share. The plaintiff must be given an opportunity to do so now. There are many clear authorities for this finding, but it will suffice to refer only to two leading cases, viz., *Chhotalal Aditram v. Bai Mahakere* (1) and *Nilkanth Bhimaji v. Hanmant Eknath* (2).

On the second point also the finding of the lower Court is too narrow. It is now a well-established principles of law that though an unregistered partition

deed may not be used to prove the terms of the partition yet it can be used to prove the intentions of the parties. In the present case talk of partition was in the air, as pleaded by the defendants themselves, and these lists, though they do not effect the partition, are yet evidence of the intention of the parties at that time. It is open to the plaintiff to adduce evidence that her father died in separate possession of all or any of the property covered by these lists; and the lists will then be corroborative of her contention that in fact the property was divided in the manner pleaded by her. This finding is supported by many published rulings, including *Janki Kuer v. Birj Bkikhan Ojha* (3), *Varada Pillai v. Jeevarathnammal* (4) and *Appanna v. Venkatasami* (5).

(1) [1917] 41 Bom. 466=40 I. C. 83=19 Bom. L. R. 322.

(2) [1920] 44 Bom. 881=58 I. C. 415=22 Bom. L. R. 992.

(3) A. I. R. 1924 Patna 641=3 Patna 349.

(4) [1920] 43 Mad. 244=53 I. C. 901=46 I. A. 285 (P. C.).

(5) A. I. R. 1924 Mad. 292=47 Mad. 203.

On the last point again the finding of the lower Court has been unnecessarily formal. It is true that the plaintiff alleged a partition and claimed that certain specified property had been allotted to her father, but the essence of her case was that her father died separate in separate possession of a share of the family property, and her claim was that she should be given his share. The lower Court held that as she could not be allowed to sue for the property in the possession of her father when he died, or to prove the details of the property she claimed. But the request involved no change in the character of the suit, or the addition of fresh pleadings. The plaintiff had been barred by the preliminary findings of the Court from proving the terms of a certain partition in support of her claim. As shown above she was entitled to fall back on any other evidence she had in order to prove the essence of her case — that her father died separate and in separate possession of his share and all her request amounted to was the very reasonable one that the Court should frame issue so that she could do so.

The decree of the lower Court should be set aside and the case remanded for further trial. The lower Court may not treat the two lists as instruments effecting a partition, but it may use them as expressions of the intentions of the parties concerned at the time these lists were made, and in support of any evidence she may have to show that Girwar Singh died in separate possession of property. The Court might enquire into the status of Girwar Singh at his death, and if he then held any of the family property in his own separate right; and it must allow the plaintiff an opportunity to prove that she is entitled to specific items of property. If she is unable to prove the specific items held by her father, she is entitled to demand that the equivalent of his one-third share shall be divided off and given to her. As the trial so far has been obscured by technical considerations it will be in the interests of parties if fresh pleadings are allowed before the issues are framed. The lower Court should also accept any relevant documentary evidence the parties may tender.

A refund certificate for the Court-fees in this Court should be issued to the

appellant, who should receive her costs in this Court from the respondents, also all costs incurred so far in the lower Court, except the Court-fees paid on the plaint, which should follow the event.

Hallifax, A. J. C.—The plaintiff is the daughter of Girwar Singh Kurmi, and filed the present suit against two of her father's brothers and the son of another brother who is dead, alleging that her father separated from his brothers before he died and was in separate possession of his share of the family property, but the defendants had taken possession of it after his death and denied her title to it as his heir. She specified the property which, according to her, Girwar Singh owned separately, and put in certain documents in support of that allegation. It has been held in the lower Court that these documents, which have not been registered, are instruments of partition and require registration and therefore the plaintiff cannot use them to prove the partition, under S. 49 of the Registration Act, and as she is precluded by S. 91 of the Evidence Act from giving any other evidence of it, her suit must be dismissed.

It is at the most a subsidiary and unessential part of the plaintiff's case that a partition was made on a certain day and that certain property was then allotted to her father's share. As has been said, her case is that her father separated from his brothers at some time before his death and was at his death in separate possession of certain property which had once been joint family property. Even if the documents cannot be received as evidence of the terms of the partition, that is a proof of what was allotted to Girwar Singh at a partition made at the time of his father's death, the fact that they were made out and signed is undoubtedly evidence, though of course not necessarily conclusive evidence, that a partition was made at that time, that is that there was a separation in status.

The correctness of the view that the two documents tendered in evidence are deeds of partition is open to great doubt; one appears to be a record of some of the property proposed to be allotted to Girwar Singh at a partition to be made later, and the other a record of the rest of the property allotted to him along with that in the first list in

a partition then already made by arbitrators. But if they admitted as evidence of what was allotted to Girwar Singh at the partition, it would still be necessary to prove what property was held by him separately later on, which may differ in some respects from the property mentioned in the lists as allotted or agreed to be allotted to his share. If it does differ, the lists are of little use; if it does not they are not necessary.

Anyhow the fact that the documents were drawn up and signed is admissible evidence of a separation in status between Girwar Singh and his brothers, which is all the plaintiff has to prove in order to get a decree for possession of her father's separate property. If she can prove further that certain property was allotted to her father's share, or merely was held separately by him at his death, she is entitled to get that property. If she cannot prove that then she is entitled to her father's undivided share in the common property, and she can get that share divided off from the shares belonging to the defendants, as they are in possession of the whole.

I agree in thinking that the decree of the lower Court should be set aside and the case remanded for trial, though that trial can hardly be described as "further," as that of the real case has not yet begun. There appears also to be no necessity for any further pleadings. All the facts that either party wishes to allege are on the record, anything further will only add to the mass of legal pleas already there in direct contravention of R. 2 of O. 6 of the Procedure Code. If, however, either party wishes to make a statement of any material fact not already stated on which reliance is placed, this should be allowed.

The defendants are responsible for the whole of the time and money already wasted over these infructuous proceedings, and in my opinion they ought to pay the whole of the costs incurred by the plaintiff up till now, except the Court-fees paid on the plaint and the memorandum of appeal; that on the plaint should follow the result of the suit and that on the memorandum of appeal will be refunded in due course.

J.V.

Case remanded.

A. I. R. 1927 Nagpur 116

PRIDEAUX, A. J. C.

Janardhan—Plaintiff—Appellant.

v.

Fishwanath—Defendant—Respondent.

Second Appeal No. 210-B of 1925, Decided on 8th October 1926, from the decree of the 1st Addl. Dist. J., Akola, D/- 4th March 1925.

Contract Act, Ss. 65 and 11 — Contract by minor is not cured by S. 65.

A contract made by a minor is *nudum pactum ab initio* and is not covered by S. 65 as that section contemplates a contract between competent parties. Therefore a minor cannot in equity be forced to restore the amount of a loan taken by him on a void contract: 15 N. L. R. 149, Foll. [P 116, C 2]

M. B. Niyogi—for Appellant.

A. V. Khare—for Respondent.

Judgment.—Both Courts below have held that as the pro-note sued upon was executed by the defendant when he was a minor, the plaintiff cannot recover thereon. It is argued that the case falls under S. 65 of the Contract Act, and that as the contract did not become void until it was established that defendant was a minor at the time, the defendant is bound to make compensation. I am referred to Second Appeal No. 143 of 1924, decided by Hallifax, A. J. C., on the 6th March 1925. In my opinion the contract in the present case was void under S. 11 of the Contract Act. There can be no contract between persons one of whom is incompetent to contract; and any contract made by a minor of this nature is void and not voidable. Section 65 of the Contract Act is based on there being a contract between competent parties and is inapplicable to a case where there is not and could not have been any contract at all. The leading case in this province is *Mt. Muliabai v. Garud* (1), where it was laid down that a minor cannot in equity be forced to restore the amount of a loan taken by him on a void contract and that a contract made by a minor is *nudum pactum ab initio*. Following that ruling, it seems to me that the present case has been rightly disposed of. I dismiss this appeal with costs. Appellant will pay respondent's costs.

G. B.

Appeal dismissed.

(1) [1919] 15 N. L. R. 149=53 I. C. 65.

* A. I. R. 1927 Nagpur 117

FINDLAY, J. C.

Sonia Koshti—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 231 of 1926, Decided on 9th December 1926, from the judgment of the Addl. S. J., Nagpur, D/- 2nd November 1926, in Sessions Case No. 11 of 1926.

* (a) Criminal P. C., S. 276—Jurors not chosen by lot—Irregularity is curable under S. 537 (a).

In jury trials it is desirable, if not necessary, that the Judge should specifically state that the jurors have been chosen by lot. Where, however, the Court did not choose the jurors by any strict process of lot, but simply selected five jurors out of the gentlemen summoned to act as such and present in Court.

Held: that the irregularity is curable under S. 537 (a) as being only an irregularity in the proceedings before or during trial. If under S. 536 (2) a trial, by mistake, without a jury is curable, it is a *reductio ad absurdum* to postulate that where the composition of the jury was not objected to by the appellant or his counsel, the proceedings should be held to be bad merely because the jurors were not selected by lot: 33 All. 385; 7 C.W.N. 118, Cons. but not Foll.; 8 Cal. 739, Appr. [P 117, C 2; P 118, C 1]

(b) Criminal P. C., S. 561-A—Juror.

Court has inherent power to exempt any particular juror on good cause shown. [P 118, C 1]

(c) Criminal P. C., S. 298 (2)—Omission or misstatement likely to mislead Jury amounts to miscarriage of justice.

A mere omission or a misstatement in a summing up is not itself a misdirection when the case has been fully heard by the Jury, but there is a miscarriage of justice where the omission or misstatement is such that the jury may probably be misled by it: *R. V. Wann*, 23 Cox. C. C. 183, Ref. [P 118, C 2]

(d) Criminal P. C., S. 297—Direction about benefit of doubt should be given to Jury.

In every charge to a jury it is well to include therein a direction that the prisoner must always be given the benefit of the doubt, but that doubt must be a reasonable and valid doubt.

[P 118, C 2, P 119, C 1]

S. R. Vaidya—for Appellant.

G. P. Dick—for Respondent.

Judgment.—The appellant, Sonia Koshti, has been convicted by the Additional Sessions Judge, Nagpur, at the trial held with a jury of an offence under S. 307 of the Indian Penal Code. The jury returned a unanimous verdict of guilty and the Additional Judge sentenced the appellant to ten years, rigorous imprisonment. The scope of the present appeal is necessarily limited by the provision contained in S. 418, Sub-

S. (1) Criminal P. C., and it only remains to consider whether there is any legal ground on which I can interfere with the verdict of the jury and the sentence passed by the Additional Sessions Judge.

The first point urged on behalf of the appellant is that the learned Additional Sessions Judge erred in not choosing the jurors by lot in accordance with the provisions of S. 276, Criminal P. C. I may at once say here that the order-sheet of 30-10-26 does not specify any of the manners in which the jurors were chosen. What it does show is that out of the 10 or 12 Jurors who had attended two were excused on private grounds stated. The order goes on to mention the names of the jurors chosen, and a further entry is made to the effect that neither prosecution nor defence had any objection to any of the jurors so chosen. I may at once say that, in jury trials it is desirable, if not necessary, that the Judge should specifically state that the jurors have been chosen by lot. In paragraph 11 of the Judicial Commissioner's Criminal Circular No. I-22 a suitable method to conduct the process of lot is indicated. In the present instance, however, for the purposes of deciding the legal question involved, I will make the most favourable assumption to the accused I can, and that is that the Additional Sessions Judge did not choose the jurors by any strict process of lot, but simply selected five jurors out of the gentlemen summoned to act as such and present in Court. In *Emperor v. Bradshaw* (1) which had reference to the old S. 460, sub-S. (3) of the Criminal P. C. only three European jurors attended and all these were empanelled there being, of necessity, no choosing by lot. Karamat Husain, J., held that the jury was not a properly constituted one and that there had been a violation of an imperative procedure prescribed by the Code of Criminal Procedure, which could not be remedied under S. 537 thereof. In *Brojendra Lal Sirkar v. King-Emperor* (2) a similar view was taken and that case had reference to S. 276 of the Code. Stevens and Mitra, JJ., who decided the said case, were of opinion that the irregularity in question was of a very grave and material nature,

(1) [1911] 33 All. 385=9 I. C. 278=8 A. L. J. 182.

(2) [1903] 7 C. W. N. 188.

inasmuch as it had affected the proper constitution of the Court; that the appellant had a right to claim to be tried by a jury chosen with strict regard to all the safeguards which the Legislature has provided and that his objection at the time had been overruled; and, on these considerations, the learned Justices held that the trial was an illegal one. The contrary view was taken by Field and McDonell, JJ., in *Empress v. Jhubboo Mahton* (3). In that case S. 240 of the old Criminal P. C. (10 of 1872) was in question. The learned Justices held that it was not seriously contended that the appellants were, in any way, prejudiced by the failure of the Judge to choose the jurors by lot; that there was no need to interfere with the verdict and that the trial, so far as that matter went, was a good one.

For my own part, I do not lay any stress on the point that the jury as constituted was apparently consented to by the defence counsel. If the irregularity was such a grave one as to prejudice the accused, much more if it, in reality, amounted to an illegality, the trial would have to be considered a bad one in view of the presumed omission of the Additional Sessions Judge to choose the jurors by lot. For my own part, I am of opinion that, in the circumstances of the present case, the irregularity in question is curable under S. 537 (a), Criminal P. C. as being only an irregularity in the proceedings before or during trial. On reading the record, I do not think any honest jury could have come to any other conclusion than that arrived at by the Jury in question. If the learned Additional Sessions Judge had tried the appellant by mistake without a jury, the defect would have been curable under S. 536 (2). It seems to me a *reductio ad absurdum* to postulate that, in the present case where the composition of the jury was not objected to by the appellant or his counsel, the proceedings should be held to be bad merely because the jurors were not selected by lot.

The second ground of appeal does not require serious discussion. In my opinion the Additional Sessions Judge had undoubtedly inherent power, and must necessarily, in the circumstances, have had such power to exempt any particular juror on good cause shown.

The remaining grounds of appeal relate to alleged misdirection of the jury on various questions of fact. The fountain-head of the provision in this connexion is to be found in S. 298 of the Criminal P. C. The Judge may under sub-section (2) thereof, if he thinks proper, in the course of his summing up, express to the jury his opinion upon any question of fact, relevant to the proceeding. For my own part, however, I cannot see that there was any obligation on the Judge to refer to the various matters of detail mentioned in the petition of appeal. A mere omission or a misstatement in a summing up is not itself a misdirection when the case has been fully heard by the jury, but there is a miscarriage of justice where the omission or misstatement is such that the jury may probably be misled by it: cf *R. v. Wann* (4). Here, I do not think any of the alleged points, on which non-direction has been assumed, could have told substantially in favour of the accused. The danger of pressing contentions of the kind, which have been urged in this connexion, may be exemplified by referring to the allegation that the Judge should have commented on the non-appearance of any appreciable number of residents or neighbours after the revolver had been fired. If it had been incumbent on the Additional Sessions Judge to mention this as an improbability in the prosecution case, it would have been equally incumbent on him to draw their attention to the fact that in India dacoits and others, when engaged in a night depredation, very often fire off a gun, not with the intention of wounding any one but with the idea, which is often found correct in practice, that residents and neighbours will, through terror, or some such motive, not emerge from their houses on hearing the report in question. After studying the record carefully, I am of opinion that the Judge's summing up was, in the circumstances, a fair and reasonable one and that there was no non-direction or misdirection which could in any way be held to vitiate the trial.

I would, however, add for the guidance of the Additional Sessions Judge that in every charge to a jury it is well to include therein a direction that the

(3) [1882] 8 Cal. 739=12 W. R. 233.

(4) 23 Cox, C. C. 183.

prisoner must always be given the benefit of the doubt, but that doubt must be a reasonable and valid doubt. In the present case I do not think the omission to give this direction was a non-direction or a misdirection of such a kind as to render the conviction invalid.

A suggestion was further made on behalf of the appellant that the revolver alleged by the prosecution to have been found in the possession of the appellant, although admittedly the same as that stolen from Mr. Rudra, Circle Inspector of Police, (P. W. 2) in 1921, was not, in reality, recovered from the appellant but must have been "planted" on him by the police. This was a question of fact, on which the jury have already given their opinion when they convicted the accused, but I desire to add that the suggestion offered on behalf of the appellant in this connexion is a strange and far-fetched one which cannot seriously be entertained on the evidence on record.

If any possible doubt remained as to the guilt of the appellant, it would be still further dissipated by the fact that although he summoned some 16 defence witnesses which apparently included various neighbours of his, he was apparently reluctant to examine anyone of them and gave them all up.

The sentence imposed on the accused for an attempt to murder a Circle Inspector of Police engaged in the execution of his duty is a suitable one and the appeal is accordingly dismissed.

D.D.

Appeal dismissed.

A. I. R. 1927 Nagpur 119

KINKHEDE, A. J. C.

Asaram—Appellant.

v.

Kanchédilal—Respondent.

Civil appeal No. 24 of 1926, Decided on 3rd September 1926, from the Appellate decree of the Dist. J., Hoshangabad, D/- 4th March 1926.

(a) *C. P. Tenancy Act—Absolute occupancy holding sold in execution of rent decree—Purchaser does not take free of all incumbrances—*

Purchaser steps into the shoes of first charge-holder.

The auction purchaser in execution of a rent decree of an absolute occupancy holding does not get it free from all incumbrances. He steps into the shoes of the holder of the first charge and has the capacity to redeem qua holder of the equity of redemption. He has the option to fall back on the prior charge or offer to redeem the mortgage. [P 119 C 2]

(b) *C. P. Tenancy Act, Sch. 2, Art. 1—Suit to enforce mortgage of absolute occupancy holding—Art. 1 does not apply.*

Suit to enforce mortgage of absolute occupancy holding does not come within the purview of Art. 1. [P 119 C 2]

J. Sen—for Appellant.

S. B. Gokhale—for Respondent.

Judgment.—The first point argued is that the auction purchaser in execution of a rent decree of an absolute occupancy holding gets the property free of all incumbrances. There is no authority for this view. In the absence of any provision in the C. P. Tenancy Act analogous to that of S. 138 of the Land Revenue Act 1917 I am not prepared to uphold this contention. The auction-purchaser steps into the shoes of the holder of the first charge and has the capacity to redeem qua holder of the equity of redemption. He has the option to fall back on the prior charge or offer to redeem the mortgage in suit.

The second point argued is that of the plaintiff's mortgage being voidable, for want of consent. The finding of the lower appellate Court on that point is that the mortgage was consented to by the landlord through one Ranchandra Munim. It is a finding of fact and I cannot interfere with it.

The third contention is that the present suit is barred by O. 2, R. 2, Civil P. C. The cause of action for the possessory suit is different from the cause of action on which the present suit is based. It is not the appellant's case that this cause of action was enforceable by suit even then.

The last point is one of limitation. I fail to see how the suit to enforce the mortgage could come within the purview of Art. 1 of Sch. 2 of the Tenancy Act of 1920.

The appeal fails and is dismissed with costs. Pleader's fees Rs. 50.

G.B.

Appeal dismissed.

A. I. R. 1927 Nagpur 120 (1)

HALLIFAX, A. J. C.

Bajirao—Applicant.

v.

National Stores—Non-Applicant.

Civil Revision No. 325 of 1925, Decided on 28th July 1926, from the order of the Small Cause Court J., Wardha, D/- 8th August 1925.

Civil P. C., O. 8. R. 6—Plea of set-off and satisfaction—Difference.

Plaintiff sued defendant his former employee on a pro-note for Rs. 180, claiming Rs. 135 as balance after deducting Rs. 45 paid by defendant. Defendant pleaded that plaintiff held his Rs. 135 in deposit as service security and that the amount was appropriated towards the pro-note.

Held: that the defendant's plea was not one of set-off but of satisfaction and no Court-fee was necessary. [P 120, C 1]

V. N. Herlekar—for Applicant.

G. Brahmaraakshasa—for Non-Applicant.

Facts.—The plaintiff sued the defendant, a former employee, on a pro-note for Rs. 180. The plaintiff after deducting Rs. 45 paid by the defendant claimed Rs. 135. The plea of the defendant was that the plaintiff held Rs. 135 in deposit as service security from the defendant and that this amount of Rs. 135 was appropriated by the plaintiff towards the satisfaction of the pro-note.

Order.—It is clear from Exhibit D-5 that the Company had to pay the defendant Rs. 135 on the day he left its service i. e., on 25-3-23, and that he had to pay the Company Rs. 180 on 21-10-22, of which he has paid a part leaving Rs. 135 still due. There is nothing more to be said about the matter. The decree of the lower Court is set aside. In its place a decree will issue dismissing the suit and ordering the plaintiff Company to pay up the costs of both parties in both Courts. Pleader's fee in this Court will be Rs. 30.

G.B.

Decree set aside.

A. I. R. 1927 Nagpur 120 (2)

MITCHELL, A. J. C.

Sampat—Defendant—Appellant.

v.

Bhujang Mali—Plaintiff—Respondent.

Second Appeal No. 226-B of 1925, Decided on 26th October 1926, from the decree of the 2nd Addl. Dist. J., Amraoti, D/- 6th April 1925, in Civil Appeal No. 8 of 1925.

Practice—Jurisdiction—Simple Small Cause Court suit tried as ordinary suit without objection in trial or first appellate Court—Objection as to jurisdiction cannot be entertained in second appeal.

Where a simple suit triable by Small Cause Court is tried as an ordinary suit and no objection as to jurisdiction is raised either in the trial Court or the first appellate Court, no question of jurisdiction can be entertained in second appeal: 21 Cal. 249, Appr. . . [P 120 C]

M. R. Bobde—for Appellant.

A. V. Khare—for Respondent.

Judgment.—The first ground of appeal has been given up, and only the second argued in this Court. The position is that the appellant, having submitted to the jurisdiction of the Subordinate Judge, and to the jurisdiction of the Additional District Judge in the first appeal, now urges in second appeal that the suit was triable by a Small Cause Court only. If this suit had been a difficult one and had been tried by summary procedure and without jurisdiction by a Small Cause Court, his arguments might have had some weight. But his suit was a simple one and was tried at length by a Subordinate Judge. The circumstances are covered precisely by *Suresh Chunder Maitra v. Kristo Rangini Dasi* (1) and, agreeing with the principle therein contained, I hold that the question of jurisdiction cannot be raised in second appeal.

The appeal is dismissed with costs. I allow a pleader's fee of Rs. 15.

G.B.

Appeal dismissed.

A. I. R. 1927 Nagpur 121

HALLIFAX, A. J. C.

Narain and others—Defendants—Appellants.

v.

Motisa and others—Plaintiffs—Respondents.

First Appeal No. 16 of 1926, Decided on 17th November 1926, from the decree of the Sub-J., No. 1, 1st Cl., Wardha, D/-20th October 1925, in Civil Suit No. 7 of 1921.

(a) *Hindu Law—Descendants of Rao Rathor now settled in C. P.—Benares School applies.*

Descendants of Rao Rathor Telis who left their original home in Ajmer about 1500 A. D., and settled in Central Provinces but who still observe the personal law which governed them in Ajmer, are governed by the prevalent School in Ajmer, namely, the Benares School, in respect of the estate inherited by a woman from her father.

[P. 121, C. 2]

(b) *Hindu Law—Mayukha does not record custom of daughter taking absolute estate.*

The Mayukha was not written till some time in the seventeenth century. The treatise is a record of pre-existing custom, but it does not record the custom of a woman taking an absolute estate in property inherited from her father; that is a later interpretation of the work: 1 Bom. H. C. 130 and A. I. R. 1924 All. 350, Ref.

[P. 121, C. 2]

(c) *Landlord and tenant—Transfer of tenancy.*

It is impossible to distinguish between a transfer of a tenancy with the consent of the landlord and a surrender of it to the landlord followed by fresh grant of it to the transferee.

[P. 121, C. 2; P. 122, C. 1]

V. R. Pandit and M. R. Bobde—for Appellants.

M. B. Niyogi—for Respondents.

Judgment.—Very nearly the whole of the argument addressed to the Court by the learned counsel for the appellants was taken up with the contention that the plaintiffs and the defendants Narayan and Jani followed the Bombay School of Hindu Law and not the Benares School. That matter was finally settled by the judgment of this Court on the 29th of March 1924 when the case was remanded for consideration of another point. The defendants were appellants in that case also, and paragraph 6 of the judgment is as follows:

The fourth point is as regards the School of Hindu Law by which the parties to this suit are governed. It is argued that the Court ought to have ascertained this from the parties and need not have assumed that they were governed by the *lex loci* namely the Benares School. This point, which involves question of the original

abode of the parties, is a question of fact and not being raised by the defendants-appellants at the stage of the trial, they cannot be allowed to urge it at the stage of appeal. I therefore disallow this objection to the decree of the lower Court.

The evidence subsequently given on the point and the long discussion of it in the judgment of the lower Court now under appeal, as well as the disquisition on it in this Court based on extensive historical research, represent a deplorable waste of time, effort and money.

Even if the matter were open for discussion, the finding must be against the appellants. It is very clearly proved by the evidence that the plaintiffs and the defendants Narayan and Jani are descendants of Rao Rathor Telis who left their original home in Ajmer about 1500 A. D., and that they still observe the personal law which governed them in Ajmer. It is admitted that at present the Hindu Law in Ajmer in respect of the estate inherited by a woman from her father is the law of what is called the Benares School, not that in force in Bombay. The learned counsel for the appellants has urged however that Ajmer at one time formed a part of the Kingdom of Gujarat, and that the Mayukha is the record of the custom in the whole of that Kingdom as laid down by the Privy Council in *Lallubhai Bapubhai v. Mankuvarbai* (1).

But it was late in the fifteenth century that Ajmer was conquered from Gujarat, which is about the time at which the ancestors of the plaintiffs left it, and the Mayukha was not written till some time in the seventeenth century. The treatise is certainly a record of pre-existing custom, but, as was pointed out by Kanhaiya Lal, J., in *Jawahir Lal v. Jarau Lal* (2) it does not record the custom of a woman taking an absolute estate in property inherited from her father; that is a later interpretation of the work of which the earliest record we have is in the judgment of the Bombay High Court delivered in 1859 in *Pranjivan Das v. Deo Kuar Bai* (3). It must be held therefore that Sita did not take an absolute estate in property inherited from her father.

But it is impossible to distinguish between a transfer of a tenancy with the consent of the landlord and a surrender

(1) [1877] 2 Bom. 388.

(2) A. I. R. 1924 All. 350=46 All. 192.

(3) 1 B. H. C. 130.

of it to the landlord followed by a fresh grant of it to the transferee. The transaction is carried through in one step or by one deed instead of two, but it is the same transaction. It is further admitted that a surrender of the absolute occupancy tenancy by Sita to the landlord would be good against the reversionary heirs of her father. It is necessary therefore to examine the correctness of the finding of fact at which the lower Court arrived that the landlord did not consent to the transfer by Sita. (The judgment then discussed the evidence and concluded that the Lambardar did consent to the transfer of the tenancy by Sita to Narayan and Jani.) A minor matter that has been left out of sight all through the case is that the deed of gift covers house property as well as the absolute occupancy holding; the landlord's consent could not validate the transfer of that. As however the houses are presumably in the abadi of the village, Sita's transfer of the license to occupy the site could certainly not be questioned by the reversioners, and it is safe to assume that they consider it not worth their while to question her transfer of the materials. Anyhow the transfer of the houses has been treated all through the case as valid or invalid along with that of the holding, and it is too late to treat it differently now. The decree of the lower Court will accordingly be set aside and in its place a decree will issue dismissing the suit. The plaintiffs will pay all the costs of both parties in both Courts.

D.D.

Decree set aside.

* * A. I. R. 1927 Nagpur 122

FINDLAY, J. C.

Mt. Rukhmabai and others—Defendants—Appellants.

v.

Jaipal and others—Plaintiffs—Respondents.

First Appeal No. 82 of 1925, Decided on 21st December 1926, from the decree of the 1st Class Sub-J., Balaghat, D/-30th June 1925, in Civil Suit No. 3 of 1924.

* * (a) *Hindu Law—Applicability—Powers of C. P. are not governed by Bombay School.*

The Powers of C. P. are not governed by Bombay School of law and though after their

migration to the Central Provinces they came into close contact with the Mahrattas and have inevitably been tinged thereby in matters of language, dress, marriage ceremonies and the like, they did not come from the Bombay Presidency, bringing with them Bombay customs. [P 125, C 2]

(b) *Hindu Law—Widow—Question as to accretion to husband's estate depends upon her conduct.*

Whether a Hindu widow, who purchases immoveable property out of the profits of the estate of her deceased husband, intends to treat the acquisition as an increment to her husband's estate or not, depends on her actual conduct in making and dealing with the acquisition: 10 Cal. 324; 14 B. L. R. 159 (P. C.); 41 Cal. 870 and 14 Cal. 387, *Rel. on.*

[P 126, C2]

H. S. Gour and S. B. Gokhale—for Appellants.

Fida Hussain and Abdul Rahman Khan—for Respondents.

Facts.—The plaintiffs Jaipal, Mahpal and Tikaram, sons of Jangli, as well as Ardeshar, Plaintiff No. 4, sued the defendants, Mt. Rukhmabai, Kisan, Soma and Jiwan, for recovery of 10 anna share in Mouza Birsula (Balaghat). The facts were that Adkoo and Ladkoo were brothers. Jangli, who was the son of Adkoo, died in 1922. After Ladkoo's death his widow Mt. Sita was in possession of a 10-anna share of Mouza Birsula as a Hindu widow. She had inherited an 8-anna share thereunder immediately after Ladkoo's death and had obtained the remaining 2-anna share under circumstances discussed below. The plaintiffs' case was that Mt. Sita, during her lifetime, gifted the 10-anna share to her daughter Mt. Sugabai who died in 1919, whereupon the Defendants Nos. 1 to 4 had taken possession of the property. The plaintiffs had insufficient funds to meet the expenses of litigation necessary for recovery of the property, hence they sold 5-anna share thereof to the Plaintiff No. 4 Ardeshar, who was accordingly joined as a party.

The defendants denied that the plaintiffs were reversioners of Ladkoo and they raised various pleas with reference to the sale of half share by the first three plaintiffs to the fourth one. The defendants contended that Mt. Sita inherited the 8-anna share on the death of her husband Ladkoo. They further pleaded that the remaining 2-anna share had been mortgaged by the original owner Dalpat to one Jai Gopal

who obtained a decree for foreclosure in Civil Suit No. 251 of 1892 in the Court of the Extra Assistant Commissioner, Balaghat. Mt. Sita made a payment of Rs. 448-6-3 towards the mortgage-decree and the Court ordered the share to be made over to her. The said payment was made by Mt. Sita out of her khamora money and in Suit No. 265 of 1893 in the Court just mentioned Mt. Sita got a decree for possession of the 2-anna share with a direction that she was to remain in possession until Dalpat paid off the amount due to Jai Gopal. This was never done and thus the share in question became Mt. Sita's absolute property. Further, under a registered deed of gift, dated the 4th June 1897, Mt. Sita gifted the 10-anna share to her daughter Sugabai and gave over possession. Mt. Sugabai died in 1919, whereupon the 10-anna share was mutated in favour of her daughter Rukhmabai Defendant No. 1, and her stepsons, Defendants Nos. 2 to 4. A further plea was offered on behalf of the defendants raising a legal point, viz., that the ancestors of Laddkoo Patel migrated to the Central Provinces with the Bhonslas from the Bombay Presidency; that Laddkoo's family and ancestors always adhered to the customs and laws prevailing in the Bombay Presidency; that the Mayukha School of Hindu Law, therefore, applied in the case, and that Mt. Sugabai had held an absolute and not a limited estate in the share in question.

The plaintiffs denied that the Mitakshara School of Law applied to the parties and traversed various other allegations put forward on behalf of the defendants.

The Subordinate Judge passed a decree giving to the Plaintiffs Nos. 1 to 3 possession of a 3-anna share of the subject mentioned, while Plaintiff No. 4 secured a decree for a 5-anna share thereof. The claim of the plaintiffs as regards the remaining 2-anna share was dismissed. Both the plaintiffs and the defendants appeal.

Judgment.—(After stating facts the judgment continued.) It will be convenient in the first instance to dispose of the appeal of the defendants. In this appeal two points are, in reality, raised. The first six grounds of appeal attack the finding of the Subordinate

Judge that the Benares, and not the Mayukha, School of Hindu Law applies in the facts of this case, while the last two grounds of appeal relate to the house which formed part of Laddkoo's share, which, it is alleged, should have been retained by the Defendant No. 1 either in whole or, at least, to the extent of a 2-anna share. I proceed at once to discuss the most-important question in this appeal, viz., what School of Law applies to the family in question.

The main pleading of the defendants on this question was contained in para. 6 of the written statement, dated the 30th July 1924. It was therein alleged that the ancestors of Laddkoo Patel migrated to these Provinces along with the Bhonslas from the Bombay Presidency, had helped the Bhonslas in their Cuttuck expedition, and in recognition of their services were granted the village and land in the Balaghat District. The Powar Patel ancestors of Laddkoo as well as his family, all through, had adhered to the customs and laws prevailing in the Bombay Presidency and, therefore, the family is governed by the Mayukha School of Hindu Law. If this were so, there would be no question but that the defendants were entitled to retain the property in suit.

On behalf of the plaintiffs it was denied that Laddkoo's family had come from the Bombay Presidency or was governed by the Mayukha Law.

The Subordinate Judge, after examining the evidence of various witnesses produced by the defendants on the point, held that their evidence was inconclusive towards supporting the allegation that the family could be held to be governed by the Mayukha School of Law. After referring to certain standard books of reference on the point, the Subordinate Judge came to the finding that there was no proof that the Powars, in general, or Laddkoo's family, in particular, came from the Bombay Presidency. He held, on the contrary, that the evidence of the plaintiffs went to show that the Powars must have come from Dharnagree. In those circumstances, there was, in his opinion, no room for the application of the principle laid down in *Balwant Rao v. Baji Rao* (1) so far as the question of the present family being

(1) A. I. R. 1921 P. C. 59, = 48 Cal 30 = 47 I. A. 213 (P. C.).

governed by the Mayukha School of Law is concerned, and he held that the Mitakshara tenets applied to the case.

Turning first to the standard books, which contain references on the subject some of which have been alluded to by the lower Court, while others have been quoted in support of the defendants-appellants' case at the hearing of the appeal it must be confessed that the references in question are fragmentary and are by no means conclusive on the point involved. In Malcolm's Memoir of Central India and Malwa, Vol. 1, at page 80, the following passage occurs :

In the early periods of Mahratta history, the family of Puar appears to have been one of the most distinguished. They were of a Rajpoot tribe, numbers of which had been settled in Malwa at a remote era ; from whence this branch migrated to the Deccan.

At page 335 of Vol. 4 of Russell's Tribes and Castes of the Central Provinces, where the Panwar dynasty of Dhar and Ujjain is dealt with, the following saying is quoted :

*Jahan Puar tahan Dhar hai ;
Aur Dhar Jahan Puar ;
Dhar bina Puar nahin ;
Aur nahin Puar bina Dhar ;*

This may be translated as follows :

Where the Panwar is there is Dhar, and Dhar is where the Panwar is ; without the Panwars Dhar cannot stand, nor the Panwars without Dhar.

Apparently, the Powars were expelled from Ujjain by the Muhammadans about 1190 A. D. and thereafter spread to several places in South India, and to the Central Provinces and Bombay : cf. page 336 of the same Volume.

At page 101 of the Balaghat District Gazetteer, the early history of the Powars is again alluded to. According to this Volume, which does not pretend to originality and is merely collated from standard works of reference and the like, some Powars having been expelled from Dhar settled at Nagardhan near Ramtek and from there gradually spread over a large part of the Bhandara, Chanda and Balaghat Districts. As a reward given to the Bhonslas in the Cuttuck expedition, they were given waste lands to the west of the Wain-ganga river and from there found their way into Mau and Baihar. These references certainly favour the plaintiffs' allegation and so far militate against the idea that the Powars, in these Provinces at least, migrated here from Bombay.

I will now turn to certain references from certain standard works which are alleged to favour the contention of the defendants. At page 1314 of Tod's Rajasthan, Vol. II, where the annals of Haravati are being dealt with, the following passage occurs :

These kingdoms of the south as well as the north were held by Rajpoot sovereigns, whose offspring, blending with the original population, produced that mixed race of Mahrattas, inheriting with the names, the warlike propensities, of their ancestors, but who assume the name of their abodes as titles, as the Nimalkurs, the Phalkias, the Patunkars, instead of their tribes of Jadoon, Tuar, Puar, &c. &c.

I have also been referred to two passages in Ketkar's Mahratta Cyclopædia. One of these is to be found at page 47 of Vol. 17 and may be translated as follows :

At Malthan in the Poona District there is a family of Powars ; it is said that this (place or house) is the origin of the Dhar Powar home.

At page 57 of Vol. 16, the following passage occurs :

The ruling family Mahratta by surname Panwar ruled in Malwa from the 9th to 13th century and were descendants of Parwar Rajpoot family.

In Duff's History of the Mahrattas, Vol. 1, Appendix page (ii), the following passage occurs :

It will thus be seen that neither Shivaji whose family came from Rajputana, nor the Peshwas, who came from Egypt, nor the Prabhus who came from the valley of the Chinab in Kashmir and Punjab via Oude and Dalbhum, are the original residents of the tract they now claim as their 'native lands.' Who then are the Mahrattas? The answer is Mahrattas are a conglomerate body of tribes and castes who have settled themselves in the tract in which the present Marathi language is spoken, and Grant Duff's History of the Mahrattas is the history of this mixed ethnic group containing Brahmans, Kshatriyas, Vaishyas, Shudras and unclassified forest tribes.

The indications, however, are that so far as the clan of Powars, who have settled in the Central Provinces, is concerned, their arrival in these parts dates from long before the Mahratta invasion. On this point I need only refer to pages 27-33 of the Nagpur District Gazetteer as well as to page 101 of the Balaghat one. The indications, however, on the fragmentary references to the question contained in the volumes quoted above, certainly seem to me, on the whole, to favour the view that the Powars, who settled here, arrived long before and altogether independently of the Mahrattas.

It will be convenient now to turn to the oral evidence on record. The

burden of proving that the Bombay School of Law applies in the present case lay heavily on the defendants and it remains to decide whether that burden has been sufficiently discharged.

It has been urged on behalf of the defendants that many circumstances go to show that the Powars are, in effect, Mahrattas from the Bombay Presidency. Their language, their marriage ceremonies, the dress of their women and the various ceremonies they observe or do not observe, are all said to point in this direction. It has been suggested on behalf of the appellants that certain parts of the evidence of the plaintiffs' witnesses go to prove the theory of Mahratta origin. Nanda (P. W. No. 7) admits that the ceremony of bhujalia is not observed by the Powars. Personally, I can attach little importance to this fact. Bhujalia is a ceremony observed when wheat is sown and is peculiar to Northern India and non-Mahratta people. Assuming that Powars are of Northern India extraction, it would be very natural for them to allow this ceremony to lapse when they found themselves settled in a non-wheat growing country. So far as the non-observance of the "pillar ceremony at marriages is concerned, this is certainly significant of the Mahratta custom, but I do not think that isolated items of this sort can be regarded as conclusive in view of the fact that originally a small clan of Powars settled in the Central Provinces and gradually came into close contact with the Bhonslas through helping them in an invasion of Cuttack and being otherwise associated with them. It would be very natural, in those circumstances for their original customs and ceremonies gradually to acquire a certain Mahratta tinge, but it is altogether a different matter to postulate of the Powars that, from the first, they came here bringing these Mahratta customs and observances with them. The same remarks would apply, it seems to me, to admissions like those made by Pratap (P. W. No. 9) that the Powar women do not wear labangas (the dress of up-country women) and also that they wear kashta which is more distinctive of the Mahratta women. (Here the evidence of defendants' witnesses was narrated and the judgment continued) In short, after a careful examination of this oral evidence, I am forced to the

conclusion that it fails to weigh the balance down in favour of the defendants' allegation. At the most, what this evidence shows is that since their migration to these Provinces the Powars have come into close contact with the Mahrattas and have inevitably been tinged thereby in matters of language, dress, marriage ceremonies and the like. The oral evidence wholly fails to establish the fact that the Powars came here from the Bombay Presidency, bringing with them Bombay customs, much less that they were governed by the Bombay School of Law. The fragmentary references in the authoritative works quoted above also seem to me very evenly balanced and, as it was incumbent on the defendants to establish circumstances proving that the Mayukha School of Law applied to them, it seems to me clear that they have failed to do so.

It has been suggested that the evidence already referred to showing that the Powars have become tinged with Mahratta customs and the like, was sufficient to shift the burden of proof to the other side. I cannot, however, concur in this allegation. As I have already shown, it was natural, if not inevitable, when the history of the Powars and their eventual connexion with the Bhonslas in these Provinces are taken into account, that there should have been a certain assimilation or lessening of the gap between the Bhonslas and the Powars. But it is a very different proposition to postulate from such a circumstance that the Powars are Mahrattas who have migrated here from the Bombay Presidency are subject to the Bombay School of Law. For the above reasons the first six grounds of appeal fail.

As regards the 7th and 8th grounds of appeal, in which it is urged that, in any event, Mt. Rukhma could not be ejected from the dwelling house, or was, at the most, entitled to retain a 2-anna share therein, it was admitted by counsel for the appellants that these grounds stood or fell with the grounds already stated. I do not think this was necessarily so on the actual terms in which grounds 7 and 8 are framed. But on the other hand, the contention now put forward does not seem ever to have been raised in the pleadings and introduced, in effect, a

new question of fact which cannot be entertained for the first time in appeal.

These findings govern the appeal of the defendants, which is dismissed. The appellants must bear the respondents' costs in this appeal.

I now turn to the appeal of the plaintiffs. Their contention in this connexion is that, as the lower Court has held that the plaintiffs have failed to prove that the 2-anna share of the property was acquired by Mt. Sita out of her khamora, the evidence on record justified the conclusion that Mt. Sita intended to treat the 2-anna share as an increment to her husband's estate and that the 2 anna share should also be passed to the plaintiffs along with the 8-anna one, for which decree has been given by the lower Court.

The Subordinate Judge dealt with this matter in Issue No. 4. I have already set forth the circumstances under which Mt. Sita acquired this share by paying off the mortgage-money due to Jai Gopal. I concur with the lower Court that the evidence on record leaves it an open question as to whether Mt. Sita made this acquisition with the aid of her khamora or personal funds, or whether she was able to pay the amount in question out of the income derived from her husband's estate. Even on this position however, the Subordinate Judge held that there was nothing on record to show that she ever intended the 2-anna share to form an accretion to the family estate, and, in coming to this conclusion, the Subordinate Judge relied on the decision in *Wahid Ali Khan v. Tori Ram* (2). In the said decision, Richards C. J., and Tudball, J., held that where immovable property is purchased by a Hindu widow in possession as such of the estate of her late husband out of the income of that estate, such property does not necessarily become an accretion to the husband's estate. The widow has full power to dispose of it during her lifetime, and it is only when she manifests during her lifetime a clear intention to treat it as an accretion to her husband's estate, or allows it at her death to remain undisposed of, that such property will become part of that estate. The facts of this case, however, were very special. The property the widows

purchased in this connexion related to a village, in which their husband had never held a share, and there are various other circumstances tending to show a distinct intention to keep the property separate. A similar remark applies to the decision in *Subramanian Chetti v. Arunachellam Chetty* (3). On the other hand, there is a strong current of decisions pointing in a somewhat different direction, and the guiding principle on the question of whether a widow intends such an acquisition, as we are concerned with, to be an increment to the husband's estate or not, would appear rather to centre around the actual conduct of the widow in making and dealing with the acquisition in question: cf. *Irsri Dutt Koer v. Hansbutti Koerain* (4), *Gonda Koor v. Koor Oodey Singh* (5), *Kula Chandra Chakravarti v. Bama Sundari Dasya* (6) and *Sheolochun Singh v. Saheb Singh* (7). Even accepting, however, the opposite proposition urged on behalf of the plaintiffs, viz., that the immovable property purchased by a Hindu widow out of the income of her husband's estate must be held to form part of that estate, unless there is proof of a distinct intention on her part to sever such a purchase from the estate and appropriate it to herself, I do not think the present appellants can, in the particular circumstances of this case, derive any benefit therefrom.

I so far agree that the Subordinate Judge looked at the legal question involved from a wrong point of view and that it was incumbent on the defendants to show that Mt. Sita regarded and treated her 2-anna acquisition as separate and distinct from the remaining 8-anna share. The oral evidence on the point in this case, in reality, carries us no further. What seems to me, however, definitely to settle the question in favour of the defendants are the terms of the deed of gift (Ex. D-8) executed by Mt. Sita in 1897, no less than five years after she had made the payment of Jai Gopal. It is true that the 8-anna share and the 2-anna share, we are concerned with, were transferred in one and the

(3) [1905] 28 Mad. 1 (F. B.).

(4) [1884] 10 Cal. 324=10 I. A. 150=13 C. L. R. 418=4 Sar. 459 (P. C.).

(5) 14 B. L. R. 159=3 Sar. 370 (P. C.).

(6) [1914] 41 Cal. 870=22 I. C. 701.

(7) [1887] 14 Cal. 387=14 I. A. 63=5 Sar. (P. C.).

(2) [1913] 35 All. 551=21 I. C. 91=11 A. L. J. 856.

same deed of gift, but this point seems to me immaterial whether or not Mt. Sita, bona fide believed that she had a right to transfer the 8-anna share. It is perfectly clear from the terms of the gift deed that she made a clear cut and explicit distinction between the nature of her interest in the 8-anna share and 2-anna share and went out of her way to affirm the fact that the 2 anna share was her personal acquisition and quite distinct from the 8-anna share she had held since her husband's death. The relevant passage may be translated as follows :

An 8-anna share of the entire 16 anna village Birsula, Pergana Katangi, Tahsil and District Balaghat, has been held from the time of my husband. This was partitioned into two pattis by Government after the death of my husband, an 8-anna share whereof is in my possession and the remaining 8-anna share was in the joint possession of other claimants. Out of this joint 8 anna share, the 2-anna share which was in the name of Dalpat was mortgaged by him. A foreclosure decree being passed in respect of it, the creditor was to get it, when I paid Rs. 450 from my own pocket, and obtained it from the civil Court, which has been in my possession and cultivation and to which also none but myself has a right. Thus, I own in all a 10-anna interest in the village.

Even, therefore, on the decisions relied on on behalf of the present appellants the facts of this case and Mt. Sita's actual conduct so clearly crystallized in the deed of gift in question, clearly prove beyond doubt that she had a distinct intention of holding this share apart from her husband's estate and never intended that the former should be regarded as an increment to the latter. This finding necessarily governs the main part of the plaintiffs' appeal.

In the final ground of this appeal, objection was taken to the lower Court's allocation of costs, but this point was not pressed in the course of argument, and, for my own part, I can see no reason for interfering with the discretion which the Subordinate Judge has exercised in this connexion. The appeal of the plaintiffs accordingly fails and is dismissed. They must bear the defendants-respondents' costs in the lower Court as already ordered.

D.D.

*Appeal dismissed.***A. I. R. 1927 Nagpur 127**

FINDLAY, J. C.

Kedarnath Bhargava—Appellant.

v.

Netram—Respondent.

Second Appeal No. 6 of 1926, Decided on 26th January 1927, from the decree of the Dist. J., Nagpur, D/- 23rd September 1925, in Civil Appeal No. 186 of 1924.

(a) *Interpretation of statutes—Retrospective operation.*

Unless from the language of a statute a contrary effect is clearly intended, even statute which takes away or impairs vested rights, must be presumed not to have a retrospective operation, although this presumption does not apply to provisions which affect only the procedure and practice of the Courts. [P 128, C 1]

(b) *C. P. Tenancy Act (1898), S. 41—Mortgage in contravention of S. 41—Foreclosure decree obtained before but tenant actually dispossessed after the Act of 1920—Landlord cannot eject the mortgagee.*

Where an absolute occupancy holding was mortgaged in contravention of S. 41 of the Act of 1898 and a foreclosure decree was obtained before but the tenant was actually dispossessed after the Act of 1920 came into force.

Held: that the landlord cannot eject the mortgagee as no complete vested right accrued in favour of the landlord before the Act of 1920 came into force. [P 128, C 2]

*W. R. Puranik—*for Appellant.

*M. R. Bobde and M. K. Hardas—*for Respondent.

Judgment.—The facts of this case are not, in reality, in dispute and the only question involved is one of law. Bakya an absolute occupancy tenant of field No. 227 in mouza Ambada, District Nagpur, had mortgaged his holding along with other property to the defendant-respondent, Netram, on 7—5—13. The defendant obtained a preliminary decree for foreclosure on 25—9—19 and entered into possession on 7—12—20. On the date of execution of the mortgage as well as on the date the preliminary decree for foreclosure was passed, the old Tenancy Act of 1898 was therefore, in force. On the date the mortgagee entered into possession, the Tenancy Act of 1920 had come into being. The plaintiff-appellant, as lambardar, on 19—1—24 brought the present suit for ejectment of the defendant from the holding on the ground of the mortgage being in contravention of S. 41 of the

Tenancy Act of 1898 and in the plaint the date of the cause of action was specifically given as the 7th of December 1920. The Judge of the first Court, so far as the relief claimed in suit as to the absolute occupancy field was concerned, held that the present suit was governed by the Tenancy Act of 1920, that the right to eject the transferee under the old arose only on the dispossession of the original tenant and that, as this dispossession had only taken effect on the 7th of December 1920, the specific relief granted to the landlord under S. 41 of the old Act was no longer available. A similar view was taken by the District Judge on the plaintiff appealing to his Court, and the same question now comes up for consideration here.

I have been referred to S. 110 of the Tenancy Act of 1920. That provision lays down that rights conferred under previous enactments shall, so far as may be, be deemed to have been acquired under the Act of 1920. In this connexion, reference has also been made by the pleader for the appellant to *Kala Tihari v. Narayan* (1); *Hindusingh v. Mangal* (2) and *Nathuram v. Jagannath* (3). These cases are authority for the view that unless an intention to the contrary is clear, an Act is to be construed as operating only on cases on facts which come into existence after the Act, and not retrospectively on cases which had come into existence before the Act. Similarly, unless from the language of a statute a contrary effect is clearly intended, even statute, which takes away or impairs vested rights, must be presumed not to have a retrospective operation, although this presumption does not apply to provisions which affect only the procedure and practice of the Courts.

Reference has also been made to *Vinayak v. Mahebulia* (4). The facts of this case were, however, obviously distinguishable from the present one. Indeed, there had then been an out-and-out sale completed together with transfer of possession before the Tenancy Act of 1920 came into force. In other words, the vested right, which rested in the landlord under the old Act had

clearly fully accrued before the Act of 1920 had come into existence. *Lalsing v. Wamanrao* (5) the facts were analogous, for there had been a mortgage with possession in favour of the mortgagee so far back as 1911. The position, on the facts of the present case, is entirely different. Here, there was a non-possessory mortgage and possession did not actually pass to the mortgagee until after the Act of 1920 was in force. Had the old Act of 1898 remained in force and had the Legislature not passed Act I of 1920, it is perfectly obvious that under S. 41 of the old Act the lambardar could not have brought the present suit before 7—12—1920, because no right of re-entry in his favour accrued so long as the tenant was on the land. The cases quoted, therefore, in favour of the appellant seem to me to have no application to the circumstances of the present case for the simple reason that no complete vested right had accrued in favour of the landlord before the Act of 1920 came into force. As *Prideaux, A. J. C.*, pointed out in *Gopalrao v. Harprasad* (6) it is difficult to see how any vesting-right can be acquired, which is dependent on the happening of an uncertain event which had not taken place when the new Tenancy Act came into being and that is precisely the position in the present case.

It is impossible, in short, to accept the contention which has been urged on behalf of the appellant that the present plaintiff's right to sue the mortgagee for ejectment in reality, came into being when the mortgage was effected. The complete cause of action, or in other words, the vested right in question, only matured on 7—12—1920 and I can find nothing in Act I of 1920 to support the proposition that the Legislature intended any such right, which was still inchoate on the 1st of May 1920, to be kept alive. I fully concur in the finding of both the lower Courts and dismiss the present appeal. The present appellant must bear the respondent's costs in the two lower Courts as already ordered.

R.D.

Appeal dismissed.

(1) [1900] 13 C. P. L. R. 143.

(2) A. I. R. 1923 Nag. 227=19 N. L. R. 110.

(3) 16 N. L. R. 106=55 I. C. 426.

(4) A. I. R. 1923 Nag. 33.

(5) A. I. R. 1926 Nag. 499=22 N. L. R. 114.

(6) 9 N. L. J. 192.

A. I. R. 1927 Nagpur 129

HALLIFAX, A. J. C.

Bikram and others—Appellants.

v.

Thakur Ganesh Singh—Respondent.

Second Appeal No. 506 of 1925, Decided on 30th September 1926, from the decree of the Addl. Dist. J., Bilaspur, D/- 31st August 1925, in Civil Appeal No. 98 of 1925.

(a) *Civil P. C., S. 100—New plea of fact cannot be raised.*

Where in a suit based on surrender by a widow defendants pleaded insanity in lower Courts and failed, it is not open to them to put further in second appeal a plea that the widow did not act with knowledge of what she was doing in effecting the surrender. [P. 129, C. 1]

(b) *C. P. Tenancy Act (1920), S. 11—Surrender by widow of tenancy inherited from a male is not invalid against reversioners.*

The surrender to the landlord by a Hindu woman of a tenancy inherited from a male without legal necessity for making it is not invalid against that male's reversionary heirs: 5 N. L. R. 172 and 9 N. L. R. 126, *Foll.*; A. I. R. 1925 Nag. 306, *Expl.* [P. 129, C. 2]

G. R. Des—*for Appellants.*

V. Bose and P. N. Rudra—*for Respondent.*

Judgment.—The last of the three grounds of appeal seeks to reopen a question of fact decided against the appellants in what purports to be a different form. The suit against them was based on a surrender on the 12th of August 1922 by a Hindu widow of an occupancy holding inherited by her from her husband. The widow, Saphuri Chamarin, died in 1923. The defendants pleaded that

in 1921 Mt. Safri became insane and quite devoid of common sense,

and that she was "quite insane" at the time she executed the deed of surrender. It has been found on the evidence that her alleged insanity has not been proved, and it is now urged in appeal that it should be held that in executing the deed of surrender Saphuri did not act voluntarily or with knowledge of what she was doing, because she is proved to have been at least of weak intellect, if not actually insane.

The plea is certainly not permissible, but an examination of it shows that it must fail anyhow. (The judgment then discussed the evidence and found that

Saphuri executed the deed with full knowledge of what she was doing.) But the main ground of appeal is the contention that the surrender to the landlord by a Hindu woman of a tenancy inherited from a male, like a transfer by her of any other property so inherited, is invalid against that male's reversionary heirs unless there was legal necessity for making it. The contrary view was very clearly expressed in *Vithu v. Mendri* (1) and *Dajiba v. Raghunath* (2) which I am bound to follow unless they are distinguishable. It is sought to distinguish both cases on the ground that they deal with the old Tenancy Act of 1898 not the present Act of 1920. The difference in the law arising out of the omission from the Tenancy Act 1920 of the provisions of S. 36 of the Act of 1898 seems to make it still more impossible under the present Act to set aside the surrender. The suggestion that the later of the two cases can be distinguished by the fact that the holding in question there was an absolute occupancy holding does not apply to *Vithu v. Mendri* (1) and anyhow the reasons stated in the judgment in the former case in respect of an absolute occupancy holding apply with even greater force to an occupancy holding.

It is next urged that the decision of the question in both judgments is wrong and it ought to be laid before a Bench to be examined again. The reasons advanced for regarding the view that has prevailed for so long as incorrect are those set out at length in the judgment of Kinkhede, A. J. C., in *Wasudeo v. Bhiwa* (3) which was decided by a Bench of this Court. But the question was not one that fell to be decided in the case. The question for decision was that of the devolution of the tenancy on the death of the widow who held it, not that of her rights in respect of it, while she held it. Many reasons are given in support of the conclusion stated incidentally, that a Hindu woman cannot surrender an occupancy holding inherited from a male to the landlord except for legal necessity or with the consent of the reversioners, but, if I may say so with respect, they have not convinced me of the correctness of the proposition, parti-

(1) [1939] 5 N. L. R. 172=4 I. C. 792.

(2) [1913] 9 N. L. R. 126=20 I. C. 920.

(3) A. I. R. 1925 Nag. 306=21 N. L. R. 62.

cularly in face of the fact that the only surrender of that kind in the case was treated as perfectly valid all through it.

There appears, on the contrary, to be a simple but cogent reason for regarding the view that has prevailed in this Court for so many years as correct. An agricultural tenancy is exactly the same as any other tenancy, such as that of a house, except for enlargements or restrictions made by the Tenancy Act in the rights or liabilities of either party to the contract. The only difference with which we are now concerned between an agricultural tenancy and tenancy of a house is that made by S. 11 of the Tenancy Act 1920. That is the only provision I have ever heard cited as limiting a Hindu woman's power to surrender an occupancy holding inherited from a male.

But that section says nothing about her rights as a tenant; it merely says, in its effect on such a case, that the tenancy shall pass on her death to her husband's heirs and not to her own. A tenancy, like any other contract, is personal and without S. 11 the unexpired term of any tenancy held by a Hindu woman would pass on her death to her own heirs, however she acquired it. S. 11 alters that in respect of an agricultural tenancy acquired by inheritance from a male, and makes it pass to the heirs of the male instead of her own. But it alters nothing else, and she has the same rights in respect of the contract of tenancy while it exists as if she had made it herself with the landlord. The words of the section show very clearly that its scope is limited to the way in which occupancy rights are to pass.

Another conclusive argument in support of the absolute right of surrender in such cases is to be found in S. 35 of the Tenancy Act. If there were no such right, the tenant and landlord could attain exactly the same result if the holding were left fallow and the rent left unpaid for a year and the tenant were to go to another village at the end of the year ostensibly but not necessarily in fact without any intention of returning. She might wish to resile from her agreement later, but her application for reinstatement under S. 36 would inevitably fail because it would be clear that she did intend to abandon the holding. The same thing could be done under S. 35

(4) of the Act I of 1898, by what was called "implied surrender"; that took two years, but it did not require the intervention of a revenue officer nor the absence of the tenant from the village. It is impossible to suppose that the Legislature intended to restrict the power to surrender directly, and yet provided this very simple way of evading that restriction.

Regarding the matter from the point of view of the landlord, the reasons for holding that such a surrender can be made are also strong. If it could not, then a contract of perpetual lease between him and a Hindu tenant who died leaving his wife or daughter or mother as his only heir could only be cancelled with the joint consent of the tenant at the time and the reversionary heirs of the last tenant. That would mean that by the death of the other party to the original contract the landlord would be deprived of no small part of his rights under it. The words of S. 11 of the Tenancy Act as they stand can not be read as bringing about any such result, nor can they have been even intended to do so.

As Drake-Brockman, J. C., said in *Dajiba v. Raghunath* (2) such an interpretation of the law would also mean that

a landlord might have to deal with a reversioner's claim as much as a century after the death of the tenant from whom descent should be traced: take for instance the case of a tenant who leaves a girl-widow and an infant daughter, the women succeeding one after the other and the daughter surrendering at the very close of a long life.

In speaking of a century the learned Judicial Commissioner seems to have added the two concurrent lives together; it is hardly likely that the infant daughter would live for a hundred years. But the argument is equally sound if we substitute half a century or three quarters of a century for the period mentioned. It becomes stronger if we take the case of a female heir to a tenancy surrendering it at the beginning of a long life.

I am in entire and respectful agreement with the decisions in the two cases discussed. They are not in conflict, as has been explained, with the actual decision in *Wasudeo v. Bhiwa* (3) or with that in any of the cases there mentioned. Each of those cases deals with the

passing on the death of a Hindu woman of a tenancy inherited by her from a male and still held by her up to her death, not with her rights and liabilities in respect of it during her life. The appeal will be dismissed and the appellants must pay the whole of the costs of both parties in all three Courts. The pleader's fee in this Court will be fifty rupees.

G.B.

. Appeal dismissed.

A. I. R. 1927 Nagpur 131

FINDLAY, J. C.

Usman Miya—Applicant.

v.

Amir Miya—Opposite Party.

Misc. Petition No. 84 of 1926; Decided on 30th November 1926.

Criminal P. C., S. 522—Order of restoration within one month of dismissal of revision from conviction is valid.

Where appeal was filed against conviction to the 1st class Magistrate, but was dismissed and then a revision was made to the High Court against the conviction which was also dismissed, an order of restoration passed by the High Court within one month of the date of dismissal of revision is valid. [P 131 C 2]

*Mangrulkar—for Applicant.**V. R. Pandit—for Opposite Party.*

Order.—The only point I am concerned with in this application is whether this Court can or should now pass an order under S. 522, Criminal P. C., putting the applicant in possession of the house. The revision application of the non-applicant was dismissed by my learned predecessor, Kotval, O. J. C., on the 30th of October last. The applicant's petition now is that the findings of both the lower Courts show that he was dispossessed by the non-applicant either by "criminal force" or by a show of criminal force.

On behalf of the non-applicant it has been urged that there has been no finding by the lower Courts in connexion with the question of criminal force or show of criminal force and I have been referred to the decisions in *Bhagbat Shaha v. Sadique Ostagar* (1), *Sadasib Mandal v. Emperor* (2), *Batakala Pottia*

vadu, In re (3), *Churaman v. Ramlal* (4) and *Mohunt Luchmi Dass v. Pallat Lall* (5), in this connexion. These cases are all authority for the proposition that a person, in whose favour an order under S. 522, is made, must have a finding in his favour that he was dispossessed by the use of criminal force. It is pertinent, first of all, to point out that all these decisions have reference to the old Criminal P. C., whereas an important amendment has been introduced in the new section. It is clear on the findings of both the trying Magistrate and the Magistrate, 1st class, that what the non-applicant did in this case was to break open the lock of the complainant's house, to throw out all the property belonging to him therefrom, and to put a lock of his own on the house thereafter. The evidence on record leaves not the slightest doubt to my mind that in this case the element of criminal force used to a person within the definition contained in S. 349, I. P. C., was present. Not only the statement of the complainant himself as a witness, but also those of Nanhubeg (P. W. 2) and Indersha Daoo (P. W. 3) clearly show that the element of criminal force to a person was present and, in those circumstances, on the findings arrived at by the lower Courts the case certainly to my mind comes within the purview to S. 522.

Even so, however, the further question remains as to whether this Court should, at the stage that has now been reached, pass an order in favour of the applicant. It has been urged on behalf of the non-applicant that the present application has been made too late and should have been preferred in either of the two lower Courts. Under S. 522, however, an option is left to the Court to pass an order thereunder within a month of the date of the conviction. In the present instance, the dismissal of the appeal by the 1st class Magistrate did not end matters, as the non-applicant applied for revision to Kotval, O. J. C. No notice was issued to the non-applicant in that case and the application for revision was summarily dismissed. The applicant has filed this present application within a month of the date of Kotval, O. J. C.'s order, and I am disposing of it within the

(1) [1912] 39 Cal. 1050=16 I. C. 176=16 C. W. N. 811.

(2) [1914] 18 C. W. N. 1150=26 I. C. 168.

(3) [1902] 26 Mad. 49.

(4) [1903] 25 All. 341=(1903) A. W. N. 59.

(5) 23 W. R. Cr. 54.

said month. In all the circumstances of the case, the ends of justice would seem to require that the applicant should be replaced in possession of the house in question and I pass an order accordingly under S. 522, Criminal P. C.

D.D.

Application allowed.

A. I. R. 1927 Nagpur 132

FINDLAY, J. C.

Atmaram—Purchaser—Appellant.

v.

Ganpati and others—Judgment-debtors—Respondents.

Second Appeal No. 136 of 1925, Decided on 8th December 1926, from the decree of the Dist. J., Nagpur, D/- 3rd December 1924, in Civil Appeal No. 166 of 1924.

(a) *Civil P. C., O. 21, Rr. 16 and 53—Assignee of holder of attached decree is also entitled to take out execution under R. 53.*

The words "his judgment-debtor" in R. 53, O. 21, Civil P. C., are equivalent to "the holder of the attached decree," and the assignee of the holder of such decree must, having regard to the more general provision of R. 16 also be entitled to take out execution under R. 53. [P 133 C 1]

(b) *Interpretation of statutes—Provisions in a statute should be construed so as to harmonize with each other.*

In interpreting different provisions of a statute every attempt should be made to avoid inconsistency in the meaning. [P 133 C 1]

*V. V. Bose—for Appellant.**M. R. Bobde—for Respondents 1 and 2.*

Judgment.—The facts of this case have been carefully and succinctly stated in the judgment of the learned District Judge and it is unnecessary to repeat them here. After Balaji's death, the name of his widow, Sita, was substituted as decree-holder on 14th July 1923 in respect of Balaji's decree against Tanba, Wasudeo and Tukaram obtained in Suit No. 231 of 1921. Two days later, viz., on 16th July 1923, Mt. Sita assigned this decree in favour of Atmaram, the present appellant. On 28th July 1923 Atmaram applied for substitution of his name in place of that of Mt. Sita in the execution proceedings. Notice issued to the three judgment-debtors and the case was eventually fixed for 25th August 1923.

Meanwhile, a suit (No. 168 of 1923) had been filed by Ganpati, the son of Deoba, and Kashinath against Mt. Sita in respect of a bond executed by Balaji in

1921 in favour of Deoba and Kashinath. An ex-parte decree was obtained on 20th September 1923 for Rs. 276-11-0, execution to be taken out of the assets of Balaji in the widow's hands. Five days later, these decree-holders applied for execution of their decree by the attachment of Balaji's decree referred to above, and the attachment was effected on 28th September 1923. Meanwhile, in the course of the execution proceedings under Balaji's decree, Atmaram objected to the attachment and contended that, in view of the assignment of the decree in his favour by Mt. Sita prior to the attachment of the decree by Ganpati and Kashinath, he was in the stronger position. Ganpati and Kashinath, on the other hand, alleged that the assignation was a bogus one and the first Court upheld this allegation. The learned District Judge, however, on the case coming before him on appeal, did not consider it necessary to go into the question of whether the assignation was a valid one or not. Following an unreported decision of the Madras High Court, which is quoted in his judgment, he held that under O. 21, R. 53, Civil Procedure Code, an assignee of a decree-holder does not stand in the same position for purposes of execution as the decree-holder himself. He was of opinion that under the rule quoted, only the decree-holder of the attached decree or the attaching creditor can take out execution thereunder and that the assignee of the holder of the attached decree cannot do so. In this view of the law, the learned District Judge did not find it necessary to go into the question of fact as to the real or fictitious nature of the assignation and dismissed the appeal of Atmaram.

I may at once say here that the second unreported decision relied on by the learned District Judge was quite inapposite for the simple reason that it had reference to S. 273 of the old Code of Civil Procedure 1882, in which the words "his judgment-debtor" did not occur at all.

We have here an apparent clash between R. 16 and R. 53 of O. 21, Civil Procedure Code. The former rule lays down that the assignee of the interest of any decree-holder may apply for execution and the decree may be executed in the same manner and subject to the same conditions as if the application were

made by such decree-holder. On the other hand, the learned District Judge, following the unreported decision he has quoted, has held that R. 53 enjoins stay of execution of the attached decree until the Court which passed the decree sought to be executed cancels the notice of attachment, or the holder of the decree sought to be executed or his judgment-debtor applies for execution. For my own part, with all deference to the learned Judges, who have decided the case referred to I am wholly unable to understand why in R. 53 it should have been necessary specifically to mention the assignee of the holder of the attached decree as entitled to execute it also in view of the more general provision contained in the first clause of R. 16, a provision which entitles the assignee to execute the decree in the same manner and subject to the same conditions as the original decree-holder. R. 53 is an ad hoc provision dealing with a particular contingency and it would seem to me that the Legislature in framing it had not in view the possible difficulty which might arise in interpreting it in relation to the contingency of assignation of a decree dealt with in R. 16. This being so, the rule of interpretation to be applied is that every attempt should be made to avoid inconsistency in the meaning of an Act. Here, on the view taken by the lower appellate Court, the more general provision contained in R. 16 is curtailed in its operation by the construction the learned District Judge has put on R. 53. That curtailment is only by implication, and had it been deliberate I should have expected to find in R. 16 some such provision as "may be executed, *save as provided in R. 53*, in the same manner and subject to the same conditions." The words underlined (*here italicized*) are my own. The words "his judgment-debtor" in R. 53 seem to be a mere matter of nomenclature equivalent to the holder of the attached decree, and if this is admitted it seems to me unquestionable that the assignee of the holder of such decree, must, having regard to the more general provision of R. 16, also be entitled to take out execution under R. 53.

Assuming the assignment to be valid Mt. Sita obviously cannot execute the decree in Suit No. 231 of 1921 under R. 16. Atmaram is now her representative and is entitled to take her place

and to execute the decree as she could have done. This being so I do not think that for him to claim priority, there was, in reality, any necessity for specific mention of the assignee of the holder of the attached decree in R. 53.

I am, therefore, of opinion that the view taken by the lower appellate Court is incorrect. Its judgment is reversed and the case must go back to that Court for determination of the validity or invalidity of the assignment in favour of Atmaram. Costs incurred in the appeal will follow the event.

J.V.

Case remanded.

A. I. R. 1927 Nagpur 133

HALLIFAX, A. J. C.

Bahoran and others—Defendants—Appellants.

v.

Chandandhar and others—Plaintiffs—Respondents.

Second Appeal No. 333 of 1925, Decided on 8th November 1926, from the decree of the Addl. Dist. J., Bilaspur, D/- 14th April 1925, in Civil Appeal No. 140 of 1924.

(a) *Tort—Conspiracy to commit—Every conspirator is liable whether the tort is committed by him personally or not.*

Where there is a conspiracy to commit a tort all conspirators are liable, even though some of them might not have actually done the act. The persons actually doing the act will be deemed to act as agents for the rest. [P 134 C 1]

(b) *Tort—Legal representatives of a tort-feasor are not liable unless benefited by the tort.*

Legal representatives of a tort-feasor are not liable in damages for the tort unless it be shown that they benefited by it. [P 134 C 1]

G. R. Deo, A. Bhagwant and S. A. Ghadge—for Appellant.

Yadaorao Bhagdikar — for Respondents.

Judgment.—The only contentions in the petition of appeal to this Court are that the finding as to the number of trees cut and their value is wrong, making the number too great and the value too high, and that there could not be "a joint decree against all the appellants." The first contention was expressly withdrawn, and the second was not argued. In its place was substituted an argument to the effect that the decree should be passed against only those of

the defendants who were proved to have taken an actual part in the cutting of the trees. They all conspired to cut the trees, and if some of them got the cutting done by the others they would surely be just as much liable as if each of them had sent out a servant to do his part for him. It may be mentioned also that the plea is hardly a wise one to take on behalf of all the defendants, when it is admitted that some of them are liable; each of those who are liable is altruistically asking for an increase of his own burden.

The plea taken on behalf of two of the twenty three appellants is sound, as far as it goes, but its success has no appreciable result. It is probably for that reason that the respondents admitted its validity, though it is raised for the first time in this Court. Ujiyar one of the original defendants died during the trial of the suit, and his two sons Manyar and Mandal were made defendants in his stead. They are not liable in damages for their father's tort unless it is shown that they benefited by it. The decree of the lower appellate Court will accordingly be modified by the removal of the names of Manyar and Mandal from the list of persons responsible for the amount of the damages, leaving the other twenty-one appellants jointly and severally responsible. These twenty-one appellants will also pay all the costs of the respondents in this appeal.

J.V.

Decree modified.

A. I. R. 1927 Nagpur 134

KINKHEDE, A. J. C.

Yeshwant Rao and others—Plaintiffs—Appellants.

v.

Mt. Tulsabai — Defendant — Respondent.

Second Appeal No. 331 of 1924, Decided on 8th November 1926, from the decision of the Dist. J., Hoshangabad, D/- 26th April 1923, in Civil Appeal No. 92 of 1923.

(a) *Hindu Law — Widow — Alienation — To dispense with proof of legal necessity consent of all existing reversioners must be shown.*

The reversioners' consent to take the place or dispense with proof of legal necessity in support

of a transaction, must be the collective assent of all such reversioners as are entitled to consent to it: 42 *Mad.* 523 (P. C.), *Foll.* [P. 136, C. 2]

(b) *Waiver—Omission to do an act not obligatory for a time short of statutory limit does not constitute waiver.*

From a failure to do an act which one is under no legal obligation to perform no legal inference of waiver or abandonment of his rights can be drawn against a claimant who remained inactive for a time short of the statutory period prescribed by law for the enforcement of his rights. [P. 137, C. 1]

(c) *Hindu Law—Widow—Alienation — Consent by a reversioner does not bind his son who takes in his own right.*

One reversioner does not claim through another, and the estoppel by consent raises only a personal bar against the consenting party. Therefore consent by a reversioner does not bind his son who gets the estate in his own right. [P. 137, C. 2]

B. K. Bose—for Appellants.

M. R. Bobde—for Respondent.

Judgment.—One Buddhu was the owner of the property in dispute. He died several years ago leaving behind three sons Mukunda, Munda, Lilloo. The sons separated and the property in suit fell to the share of Mukunda on whose death his son Sitaram succeeded to the inheritance: Sitaram died in 1865 leaving behind two widows Mt. Godha and Mt. Mankuriya. Mt. Godha subsequently died and thus Mt. Mankuriya was the sole surviving widow in whom the whole inheritance vested. She died in 1920. At her death Plaintiffs Nos. 3 to 12 became the actual reversioners to the estate. They have brought this suit to recover possession of the property from the defendants alienees who foreclosed the same in 1900 Exhibits D-1 and 2 on the basis of a mortgage deed of 1896 Exhibit P-10, which is challenged on the ground of want of legal necessity. Plaintiffs 1 and 2 have joined in the sale as assignees of a moiety from the rest of the plaintiffs. The defence is that the mortgage was supported by legal necessity and was further consented by one Keshao the father of Plaintiff No. 12, and that Plaintiff No. 12 was estopped from asserting his claim to avoid the mortgage owing to his father's consent.

As to the rest of the plaintiffs' right to sue was denied on the ground that they were not the reversionary heirs of Mukunda. As many as 15 issues were framed, on 9th September 1922 by Mr.

Choubal, Sub-Judge and Mr. Mohgaonkar added one more issue No. 16. The latter Judge tried the case and dismissed the suit holding that plaintiffs had no right to recover the property as the mortgage was for legal necessity and the consent of Keshao was binding on his son Plaintiff No. 12, and showed that the transaction was unimpeachable as a whole at the instance of the rest of the Plaintiffs Nos. 3 to 11 even though they had proved their relationship and rights as reversioners of Sitaram's estate. The first Court's findings on the question of legal necessity are principally incorporated in paragraph 18 of the judgment wherein the decision on Issues 8, 9 and 10 which deal with that question is given. Against this dismissal of the suit, the plaintiffs filed an appeal to the lower appellate Court, but that Court recorded a final judgment endorsing the views of the lower Court and ultimately dismissed the appeal. Hence this second appeal by the plaintiffs.

I think this appeal must succeed. An examination of the pleadings of the parties discloses that the defendants had gone to the length of denying the relationship of Plaintiffs 3 to 10 with Sitaram the deceased husband of Mt. Mankuriya the alienor. Both Courts have concurrently held that they have established their genealogical tree and that they are the nearest reversioners to the estate. One of the sons of Keshao had not joined in the suit. The suit was therefore confined to the 6/7ths share out of the 8 annas share of the village and half the entire fields.

About the year 1873 Mt. Mankuriya sold half the village for no legal necessity. She had also turned out unchaste and therefore the then existing five reversionary heirs—Nandram, Soma, Pandam-sing, Shiam and Kesho instituted two suits, Nos. 16/73, 13/76 respectively against Mankuriya and her alieness Anna and Fadali Exhibit P-2. The grandsons of Soma and the sons of the rest of the plaintiffs to those suits are parties to this suit. The first was a suit for possession on the ground of her unchastity and the second was for avoiding the sale. The first claim was dismissed Exhibit P-1, whereas in the other suit a decree declaring the alienation by way of sale void beyond Mt. Mankuriya's lifetime was passed Exhibit

P-2. The appeal preferred by the alienees against the decree in Suit No. 13/76 was dismissed on 29th August 1876, Exhibit P-3.

Thereafter twenty years elapsed and the widow again alienated the remaining moiety of the village by mortgaging the same to Defendant No. 1's husband, Matandin. The absolute occupancy fields were also comprised in the mortgage. The specific allegations on which the defence of legal necessity was based were that the money was wanted for payment of revenue and rent, and for cultivation and purchase of bullocks. The mortgage was therefore said to be binding on the reversioners if any and so far as Plaintiff No. 12 Ram-prasad was concerned, it was contended that his father Keshao's consent bound him and disentitled him from claiming to assert his reversionary right to the property in suit. My object in setting out these pleas of legal necessity and consent is to show that they have absolutely no reference to the grounds on which the Courts below have based their findings as to the binding character of the mortgage. The defendants having denied the relationship of the Plaintiffs 3 to 10 it did not lie in their mouth to assert that they by their silence and long inaction acquiesced in the transaction of mortgage and must therefore be presumed to have impliedly assented to it.

There is also no manner of a suggestion even that the purposes for which the defendants now allege the debt was incurred were then disclosed, but were omitted from the mortgage deed either inadvertently or through mistake. The husband of Mt. Mankuriya had died in 1865 and the mortgage in suit was executed in 1896 i. e., nearly 31 years after the husband's death and there is not a shred of any plea or proof that the husband had left any debts to pay or that the widow had continued the husband's borrowings for any purposes of legal necessity. The justifying cause for the mortgage had therefore to be found out on the state of affairs existing 1896 and not with reference to the conditions obtaining in Sitaram's lifetime prior to 1865 or be supplemented by or interpreted with reference to the state of inaction on plaintiffs' part (as contrasted with the activity of their predecessors in interest

in 1873-76), since 1900, when the mortgagee entered into possession. And still the Courts below have based their decisions on these extraneous and remote circumstances which, in the state of the pleadings, can have absolutely no bearing on the merits of the plaintiffs' case but are absolutely outside the pale of legal proof of legal necessity.

In paragraph 18 of the trial Court's judgment four main circumstances were relied on to support the finding of legal necessity: (i) the concurrence of Keshao, one of the plaintiffs in the suit of 1876 coupled with the fact that he was a co-defendant in the mortgage suit, was said to have raised a very strong presumption that the mortgage was for purposes binding on the reversioners; (ii) the fact that the other reversioners did not sue for declaration as they did in the case of the alienation of 1873 also was said to have supported the presumption; (iii) that besides this presumption there was some evidence on record from which it might be gathered that there was necessity for the mortgage; amongst such evidence it appears the Sub-Judge relied on an inference drawn from the circumstance that Sitaram used to borrow loans carrying interest at Re. 1 or Re. 1-8-0 per cent. per mensem during his lifetime when he held the whole property, that the income was insufficient to meet expenses, much more so would be the case when the widow had only half the village and lands after the alienation of 1873 and therefore concluded that "it was probable that there may be necessity for the mortgage in 1896." He also took stock of the plaintiffs' rebutting evidence and finding that there was none held that the mortgage and the decree was binding on the plaintiffs.

Since these very conclusions have been practically confirmed by the lower appellate Court the learned advocate levelled his attack against them. I therefore proceeded to consider them.

Every one of the facts relied on by the Courts below is hardly sufficient to give rise to the conclusion of the existence of legal necessity for the mortgage whether you consider it singly or all of them collectively. The concurrence of one of several persons could not take the place of concurrence of all such persons as are interested in quarrelling with the transaction as repeatedly held by their Lord-

ships of the Privy Council in *Debi Prosad v. Golab Bhagat* (1), accepted as good law in *Rangasami Goundan v. Nachiappa Goundan* (2). The assent of the kindred must be of all those who at the time constitute the reversion. In short if the assent is to take the place or dispense with proof of legal necessity in support of the transaction, it necessarily follows it must be the collective assent of all such kindred as are entitled to contest it. The consent to be evidence of propriety must therefore be the consent of all the then existing reversionary heirs. If such consent is not secured, but only a fractional body of reversioners shows its concurrence, the necessary legitimate inference is that the assent may according to the circumstances of the particular case, give rise to a very very weak presumption and may not lighten the burden of proving legal necessity.

In short, the assent affects the quantum of proof needed, and does not dispense with it altogether if it is not of the whole body of reversioners, to support the transaction on the ground of legal necessity. The learned advocate argued that the assent of one is no evidence against the non-assenting reversioners and therefore the finding may be ignored as based on no evidence. This may be a plausible argument in an extreme case but I do not think I can subscribe to such a broad proposition as that. What degree of weight is to be attached to such assent must always vary according to the circumstances of each case. It cannot be altogether ignored but must have its due weight in the scale of preponderance of evidence. I cannot, however, help remarking that if it be unsupported by any other circumstances, it may not be quite safe to rely upon such a flimsy basis to deprive the actual reversioners of their inheritance. The first circumstance it, will thus be seen, does not altogether debar the plaintiffs from suing for relief.

As to the 2nd circumstance, namely the inaction of plaintiffs since 1900, when the mortgagee entered into possession as contrasted with the activity of their predecessors in 1873-76. Suffice it to say it is one of the weakest arguments that one comes across. The lady survived the

(1) [1913] 40 Cal. 721=17 C. L. J. 499=19 I. C. 273=17 C. W. N. 701 (F.B.).

(2) [1919] 42 Mad. 523=50 I. C. 493=46 I. A 72 (P.C.).

foreclosure for 20 years and the plaintiffs were helpless they could not do anything during her lifetime beyond getting the mortgage or the foreclosure decree inoperative beyond the lifetime of the widow. But the lower Courts themselves admit that they were not bound to sue. If this was so, then from a failure to do an act which one is under no legal obligation to perform no legal inference of waiver or abandonment of his rights can be drawn against a claimant who remained inactive for a time short of the statutory period prescribed by law for the enforcement of his rights. Moreover, there is yet no law which says that a Hindu widow's alienation, if not impeached by a suit within 6 years of its execution will bind the presumptive or even the actual reversioner. The law cannot be so unjust to expectant heirs. The word 'obligation' as defined in the specific Relief Act connotes a legal duty to do or not to do certain things. The mere circumstance that their predecessors were very active in 1873-76 affords no justification for drawing the conclusion that plaintiffs lost their rights by their inaction or that the so-called presumption raised by the consent of a single reversioner gains any strength so as to disentitle the actual reversioners from asserting their legal rights when the right moment arrives.

The 3rd circumstance is as weak as the rest because of the non-specification of the so-called other evidence, for which I searched in vain throughout the record. The mere circumstance that the husband had during his lifetime borrowed on 2 or 3 occasions loans at Rs. 1 or Rs. 1-8-0 per cent. per mensem would not lend any support to the mortgage, by his widow 31 years after his death. The husband may have had some urgent need for those borrowings. It is not the defendant's case that the husband left any debts which the widow had to liquidate and that her income which she reduced by her own improper action of alienating half the estate in 1873, was insufficient to meet her needs and therefore she was required to borrow money on the security of the moiety left with her. There is absolutely no reliable proof on record to prove the purposes for which the money was alleged to have been borrowed. Had there been some recitals in the mortgage deed Ex. P-10 as to these purposes there would have been some justification

to supply the missing links which time had obliterated as contemplated by the Privy Council decisions bearing on the point in *Venkata Reddi v. Rani Saheba of Wadhwan* (3), but there is none.

Where the party on whom the burden lay had failed to give any prima facie good evidence which would show that there must have existed legal necessity to borrow on a mortgage of the property, I cannot understand how the party impeaching the alienation could be blamed for not finding any evidence to prove want of legal necessity. The case has been decided on wrong principles, and the alienation must therefore be set aside.

In this state of the facts, I am not prepared to give to the alienee the benefit of the very very weak circumstance of consent by one of several reversioners so as to override the plaintiffs' right to succeed to the estate after the death of the alienor. To accept such consent as ample proof of legal necessity is to enable one of several persons entitled to contest an alienation to sign away behind their back the rights of the rest of the body of reversioners in spite of the fact that they never actively encouraged the alienee to enter into the transaction, or affirmed the same in such a manner as to lead him to belief that this had been rendered secure against all future attack when the succession could open out on the widow's death by the consent of one of them. This clearly establishes that the alienation does not bind the Plaintiffs 3 to 11 on any account.

The only point now remains is whether Keshao's consent precludes his son from suing to claim the inheritance. Since one reversioner does not claim through another, and the estoppel by consent raises only a personal bar against the consenting party and since that bar has died with the death of Keshao and cannot survive as against his sons who get the estate in their own right. I see no valid reason for holding Plaintiff No. 12 disentitled to claim the relief of possession proportionate to his share. There is ample authority for this view which needs no specific mention as the proposition is so very plain and obvious. I therefore uphold his claim as well.

(3) [1920] 43 Mad. 541=55 I. C. 533=47 I. N. 6 (P.C.),

The appeal therefore succeeds and the decrees of the Courts below are reversed and the plaintiffs' claim is decreed with costs against the defendant-respondent who will pay the costs of both parties in all the three Courts.

G.B.

*Appeal allowed.***A. I. R. 1927 Nagpur 138**

HALLIFAX, A. J. C.

Ramlal—Defendant—Appellant.

v.

Narayanrao and others—Plaintiffs—Respondents.

First Appeal No. 39 of 1926, Decided on 18th November 1926, from the decree of the Sub-J., 1st Cl., Harda, D/- 26th April 1926, in Civil Suit No. 23 of 1925.

(a) *Transfer of Property Act, S. 83—Mortgagee refuses tender without assigning reason or stating exact dues—Tender is valid.*

Where a mortgagee refuses a tender by the mortgagor of mortgage money, which is only a little less than the amount alleged to be actually due, without assigning any reason at all or without making any statement as to what the dues really are, the tender must be held to be valid. [P 138 C 2]

(b) *Transfer of Property Act, S. 83—Deposit and notice are a clear demand for accounts which mortgagee in possession must render under Cl.(g) of S. 76, Transfer of Property Act.*

The deposit and the notice under S. 83 must be regarded as a clear demand for a statement of accounts with which the mortgagee is bound to comply under Cl. (g) of S. 76. [P 138 C 2]

(c) *Transfer of Property Act, S. 84—Interest ceases on mortgagee refusing tender under S. 83.*

Mortgagee's refusal of tender of the mortgage money by mortgagor deprives him of all claim to interest thereafter. [P 138 C 2]

(d) *Mortgage—Suit for—Mortgagee in possession must prove amount of mortgage money due and must disprove amounts alleged as nazarana to him.*

In a mortgage suit it is for the mortgagee in possession to prove the sums due to him and also to disprove any amounts that he is alleged, with any reasonable show of truth, to have received as nazarana. [P 139 C 1]

G. L. Subhedar—for Appellant.

V. Bose and B. K. Bose—for Respondents.

Judgment.—There is only one question for decision in the appeal, and there was practically nothing else for decision in the suit in spite of the twenty-one issues framed. The question is whether more

or less than Rs. 825 in addition to the Rs. 7,000 due as principal was due on the mortgage on the 18th of May 1924. As the mortgagee in possession has steadily refused to give any accounts, and has even now put in statements that are impossible to understand and have not been proved, the decision of that question should be against him at once. But there is ample proof that the amount due was less than Rs. 7,825.

The sum to be paid for redemption was Rs. 7,000 plus rental arrears on the date of redemption minus any amount paid as nazarana during the period of the mortgagee's possession. The mortgagee's own statements come to this that the rental arrears in May 1924 did not amount to more than Rs. 870-3-9, of which most if not all have been recovered since then. As he refused the tender of Rs. 825, which is only Rs. 45-3-9 less, without assigning any reason at all or making any statement of what the rental arrears really were, the tender must be held to be valid.

It is impossible to hold that a mortgagee in possession can set the mortgagor guessing as to the income he has derived from the property and can refuse his tender if it is below the exact amount, by however little. The deposit and the notice under S. 83 of the Transfer of Property Act must be regarded as a clear demand for a statement of accounts, with which the mortgagee is bound to comply under Cl. (g) of S. 76 of the Act, but anyhow the principle of that section would make the tender of Rs. 7,825 in May 1924 valid, so as to deprive the mortgagee of any claim to interest after it was made, even if the amount actually due to him was a little more than was tendered.

But it is very clearly proved that it was less. On the 27th of November 1922, one Gangaram surrendered land to the mortgagee in consideration of the cancellation of debts of the face value of Rs. 2,055 and the land was immediately leased again to Bhika Rajput for a cash payment of Rs. 2,000. Without the strongest proof, and none of any sort is offered, it would be impossible to suppose that the actual value of the debts cancelled was as much as Rs. 1,955. Even if no more than Rs. 100 of it was irrecoverable, the amount due on the mort-

gage in May 1924 is reduced to less than Rs. 7,825, to say nothing of interest.

There is also another sum of Rs. 400 paid as nazarana on the 2nd of June 1924 against which there is no payment for the surrender to set off. This is proved by the deposition of Phulchand Bania (P. W. 4) and Exhibit P-16. The payment was made shortly after the 24th of May 1924, but it was before the 30th of June when the mortgagee refused the sum tendered as insufficient. It was clearly much more than sufficient.

There are other sums of nazarana for which the mortgagor ought to have been given credit, but there is no appeal in respect of the lower Court's omission to give it. Anyhow that Court's decision that the mortgagee's refusal of the tender made in May 1924 deprived him of all claim to interest thereafter is obviously correct. The decree of the lower Court must however be varied in view of the fact that the mortgagee is still in possession, though the amount decreed was paid to him on the 11th of October of this year. That exceeds the sum now due to him, and therefore possession must be delivered at once, and the sum to be refunded must be ascertained in execution proceedings.

The price of redemption is Rs. 7,000 plus the amount of rental arrears on the date of delivery of possession minus a sum equal to compound interest at $7\frac{1}{2}$ per cent. per annum on Rs. 7,000 from the 18th of May 1924 to the date of delivery of possession and any amounts received as nazarana between those dates and the costs of the mortgagor in both Courts. It will be for the mortgagee to prove the amounts of the rental arrears, and also to disprove any amounts that he is alleged, with any reasonable show of truth, to have received as nazarana.

A decree will accordingly issue, in supersession of that of the lower Court, declaring that the mortgage has been redeemed and ordering that the excess paid to the mortgagee shall be ascertained in execution proceedings and refunded to the mortgagor.

J. V.

Decree varied.

* A. I. R. 1927 Nagpur 139

KINKHEDE, A. J. C.

Mt. Kurshid Begum—Defendant—Appellant.

v.

Abdul Rashid—Plaintiff—Respondent.

Second Appeal No. 315 of 1926, Decided on 2nd December 1926, from the decree of the Dist. J., Nagpur, D/- 28th August 1926, in Civil Appeal No. 4 of 1924.

* (a) *Restitution of conjugal rights—Mahomedan Law—Even where validity of marriage is proved, restitution may be refused on the ground of even a reasonable apprehension of danger to the wife's health, happiness or life.*

In the case of Mahomedans a suit for restitution of conjugal rights is in the nature of a suit for specific performance, being founded on a contract of a marriage, which the Mahomedan Law regards as a civil one. Even, therefore, if the validity of the marriage be established, the relief of restitution of conjugal rights may be refused on such grounds as that its enforcement would be prejudicial or dangerous to the health, happiness or life of the wife. [P. 141, C. 2]

Not only a defence of actual violence of such a character as to endanger the wife's health and safety or to render it unsafe for the wife to return to her husband's domain, but also of "a reasonable apprehension of it" would among them constitute a valid defence to a suit for restitution of conjugal rights. [P. 142, C. 1]

* (b) *Restitution of conjugal rights—Suit for—Real object of suit is to covert wife's property—Court will not assist—Any reprehensible conduct of husband is sufficient for refusing him restitution—Mahomedan Law.*

If a husband's real object in suing for restitution of conjugal rights is to covert his wife's property, a Court of justice will not encourage a covetous husband by subjecting his wife's person to his full and absolute control and forcing her to go under his domain both physically and mentally. Any reprehensible conduct on the husband's part if properly proved affords good ground for refusing to him the assistance of the Court. [P. 142 C. 2]

* (c) *Restitution of conjugal rights—Suit by husband—Long neglect on his part—Wife is entitled to refuse to go to him.*

In a suit for restitution of conjugal rights by husband, long neglect on plaintiff's part is sufficient to entitle the wife to refuse to go to him and she is within her legal rights in denying the plaintiff's claim to restitution of conjugal rights as against her. [P. 144, C. 2]

(d) *Restitution of conjugal rights—Suit by husband—Mahomedan Law—Criminal P. C. S. 488.*

The principle, that where a wife is turned out or ill-treated so as to make it impossible for her to live with her husband, or where the breach between the husband and wife is irremediable so that it is impossible for the latter to return to the former after many years' separation without leading to fresh trouble and dispute, she is entitled to maintenance by living separate from him applies equally to the case of a Hindu or a

Mahomedan whether the question arises under S. 488, Criminal P. C., or in a suit for restitution of conjugal rights : 170 P.L.R. 1914, Ref.

[144, C. 2]

W. R. Puranik, S. R. Mangrulkar and S. T. Bhawe—for Appellant.

M. B. Niyogi, A. V. Khare and W. B. Pendarkar—for Respondent.

Judgment.—The facts of this case are given in sufficient detail in the first Court's judgment. The claim of the plaintiff-respondent Abdul Rashid, which was for restitution of conjugal rights against the appellant Mt. Khurshid Begum who is his wife, was decreed in the Court below. The appellant, therefore, moved this Court for discharging the decree directing such restitution. This Court by its judgment, dated 8th December 1925, remanded the case to the lower appellate Court for finding on the following issues :

(1) If a decree for restitution of conjugal rights is granted to the plaintiff respondent, is there likely to be danger to the life, health or safety of the defendant-appellant ?

(2) Is there any other reason why the Court should not exercise its discretion in favour of plaintiff ?

After remand fresh pleadings were made and evidence adduced by both the parties. The learned District Judge decided both the issues in the negative and came to the conclusion that there were no good grounds for apprehending danger to the life, health or property of the appellant.

The correctness of this conclusion is challenged by the appellant in her memorandum of objections. The gist of those objections is that the lower appellate Court misconceived the whole case and the evidence on record, allowed its mind to be influenced by extraneous irrelevant matters, and made wrong assumptions not warranted by legal evidence, and that as the lower appellate Court has held that the respondent covets the appellant's valuable property, the only legal conclusion to be based upon the fact so found was that it would not be safe to grant him a decree for restitution of conjugal rights, as such a decree, if granted, would not only deprive her of her valuable property, but was likely to endanger her life, health and personal safety for the rest of her life. It is also urged that as the lower appellate Court failed to draw this legal conclusion the decree is not binding on this Court in second appeal.

At the very outset I must say that the District Judge, Nagpur, who decided the case after remand has gone off his way and allowed his mind to be influenced by evidence and circumstances which had little or no bearing on the case, and belittled the importance of the plaintiff's conduct antecedent to the suit towards the appellant. He has failed to view the case in its right perspective, and consequently it has not received that attention at his hands with reference to the Mahomedan Law applicable to the parties, which it deserved : consequently his decision which is based more on conjecture than on legal evidence cannot stand. A careful study of the record shows that he has not grasped the interconnection between the present litigation and the previous one relating to the property in which the appellant succeeded in securing a decree against her husband as regards her valuable property. Not only this, but he has failed to give full effect to the several directions and consider the various important matters to which the learned Officiating Judicial Commissioner had specially drawn the attention of the Court of first appeal in paras. 10 and 11 of his judgment. I am therefore, constrained to ignore his finding as to the absence of reasonable apprehension and proceed to decide the case independently of such a finding. (After referring to the previous litigations the judgment proceeded.) The defendant's objection to the jurisdiction of the Nagpur Court to try her case having been disallowed by the Court by an order dated 29th September 1923, she was asked to file her written statement on the merits, which she did on 22nd October 1923. Her defence was that she was not the married wife of plaintiff, that she was not bound by the adverse decision in Suit No. 55 of 1915, and that it did not operate as *res judicata* in this case. She further pleaded in para. 4 that plaintiff was a man of no property and was entirely dependent for his maintenance on his father, that plaintiff and his father and she herself were not on good terms, and that owing to the litigation it was impossible for the parties to live together as husband and wife. She asserted that she was not willing to accept the marriage even if it be held to have taken place. In reply to these allegations the plaintiff in para. 4, of his reply dated 29th October 1923

denied the defendant's assertions and in spite of the defendant's point blank refusal, dated 4th March 1922, to go to live with him as his wife as per Ex. P-4-1, D-4, and evidently falsely misrepresenting facts he stated as follows:

It is also denied that she in fact, refuses to accept the marriage. She is personally quite willing to abide by and fulfil her marriage contract. It is only Abdul Sattar who is putting forth these pleas on her behalf.

This allegation, however, remains unproved. The issues framed in the case mainly referred to the question of the marriage and its binding character by reason of the former decision. No issues were framed with regard to alternative questions raised in para. No. 4 of her written statement.

The first Court held that the previous decision operated as *res judicata* and thought that there was absolutely no case left for Defendant No. 1 for resisting the plaintiff's claim for restitution of conjugal rights, and, therefore, decreed the claim. The District Judge, Nagpur to whom she appealed for redress, upheld the decision as to *res judicata* and overruled the contention that the Court should have exercised its discretion in refusing to pass a decree for restitution of conjugal rights in the circumstances of the case, on the supposition that it had no foundation in the pleading. The appellant, therefore, appealed to this Court on two grounds. The learned Officiating Judicial Commissioner held in his remanding judgment with reference to the first point that the decision in Suit No. 55 of 1915 operated as *res judicata* on the factum and validity of the marriage between the parties, but with regard to, the second point, thought the case was not properly tried, and, therefore, sent down the two issues set forth in para. No. 1 above.

The necessity for sending down these issues and giving the directions which the learned Officiating Judicial Commissioner gave, and the points to which the District Judge's special attention was directed, can be best understood when read in his own words:

(10) Although the appeal so far fails on the question of *res judicata*, it seems to me that both the lower Courts have wholly failed to give due consideration to another aspect of this case. It has been strongly urged before me that the relief claimed by the plaintiff-respondent was a discretionary one which it was to the Court to refuse even though the validity of the marriage

was established. The soundness of this proposition cannot be questioned. In the case of Mahomedans a suit for restitution of conjugal rights is in the nature of a suit for specific performance being founded on a contract of marriage, which the Mahomedan Law regards as civil one, even therefore, if the validity of the marriage be established, the relief of restitution of conjugal rights may be refused on such grounds as that its enforcement would be prejudicial or dangerous to health, happiness or life of the wife *cf. Moonshee Buzloor Ruheem v. Shumsoonissa, Begum* (1). In *Hamid Husain v. Kubra Begum* (2) Piggot and Walsh, JJ., confirmed the dismissal of such a suit by the lower Court and, in arriving at this decision, one of the considerations taken into account was that the real reason for the bringing of the suit by the plaintiff was his desire to obtain possession of the defendant's property.

(11) It has been suggested, however, on behalf of the respondent that no specific plea was taken on this issue by defendant No. 1. This is, however, incorrect. In para. 4 (h) of the defendant No. 1's written statement, dated 22nd October 1923, the following passage occurs:—

Plaintiff and plaintiff's father and defendant are not also on good terms. There was much litigation between plaintiff and defendant and one execution case of the defendant is even now pending against the plaintiff, and so even if the alleged marriage be held proved and binding on the defendant, still it is impossible for the parties, i. e., plaintiff and defendant No. 1 to live together as husband and wife.

If this amounts to anything at all it necessarily raised a matter which the lower Courts were bound fully to consider before granting the relief they did. As this matter will have to be the subject of enquiry by the Courts below it seems to me undesirable to go into details at present but I may say that there is ample matter on the record to show that the plaintiff has been on the worst of terms with the defendants and her relations for years back. There was a struggle for possession of the moveable property and immovable valuable property and apparently in execution proceedings even a warrant of arrest had issued against the plaintiff. All these matters required full consideration, before the Court in the exercise of its discretion, should have granted the decree it did. It will have to be carefully considered whether, if a decree for restitution of conjugal rights is granted, there will be danger to the health, life or safety of the appellant, and the lower appellate Court will also have to consider whether the suit has been brought for the bona fide purpose of obtaining the relief claimed therein, or whether the real object of the plaintiff is to obtain possession of the property which has been the bone of contention between the parties for years past.

It will thus be seen that the District Judge was bound to approach the question whether to grant or refuse a decree for restitution of conjugal rights from the point of view of the suit being in

(1) [1867] 11 M. L. A. 551=8 W. R. P. C. 3=2 Suther. 59=2 Sar. 259 (P. C.).

(2) [1918] 40 All. 332=44 I. C. 728=16 A. L. J. 132.

the nature of a suit for specific performance of a civil contract of marriage, as pointed out by the learned Officiating Judicial Commissioner in para. 10 of his judgment with advertence to the remarks of their Lordships of the Privy Council in *Moonshee Buzloor Ruheem v. Shumsoonissa Begam* (1) : cf. *Asha Bibi v. Kadir Ibrahim Rowther* (3). On behalf of the appellant reliance is, however, placed before me on the following passage occurring in their Lordships' judgment at pages 611 and 612 :

The Mahomedan Law, on a question of what is legal cruelty between man and wife, would probably not differ materially from our own, of which one of the most recent expositions is the following :

There must be actual violence of such a character as to endanger personal health or safety, or there must be a reasonable apprehension of it. 'The Court,' as Lord Stowell said in *Evans v. Evans* (4), 'has never been driven off this ground.'

It is pointed out that :

The marriage tie amongst Mahomedans is not so indissoluble as it is amongst Christians. The Mahomedan wife has rights which the Christian—or at least the English—wife has not against her husband. An Indian Court might well admit defences founded on the violation of those rights, and either refuse its assistance to the husband altogether, or grant it only upon terms

It will thus be seen that not only a defence of actual violence of such a character as to endanger the wife's health and safety or to render it unsafe for the wife to return to her husband's domain, but also of "a reasonable apprehension of it" would among them constitute a valid defence to a suit for restitution of conjugal rights : *Abdul Kadir v. Salima* (5) and *Dular Koer v. Dwarka Nath Misser* (6).

In cases arising under S. 488, Criminal P. C., cruelty falling short of physical violence, but such as to jeopardize health or sanity would be sufficient cruelty to justify a refusal on the wife's part to live with her husband, and yet to get maintenance from him. A husband may by his misconduct disentitle himself to a decree for restitution of conjugal rights : *Husaini Begam v. Muhammad Rustam Ali Khan* (7). In *Khurshedi*

Begam v. Khurshed Ali (8), which was a case of a husband who was an impetuous, selfish and unscrupulous young man who cared more for his wife's property than for her, the High Court set aside the decree for restitution of conjugal rights imposing conditions on the husband coming over to her father's house, as they thought that the wife's personal safety could not be safeguarded by such conditions. They did not think it at all safe to leave the young wife to the tender mercies of an ill-tempered, unscrupulous and unkind husband who had little or no regard for his wife.

In *Hamid Husain v. Kubra Begam* (2) a decree for restitution of conjugal rights was refused to the plaintiff (husband) although it was found that there was no very satisfactory proof of actual physical cruelty, but the parties were on the worst possible terms and the reasonable presumption was that the suit was brought for the purpose of getting possession of the defendant's property rather than to have her to live with him. The Court was of opinion that by a return to her husband's custody the defendant's health and safety would be endangered. In *A (wife) v. B (husband)* (9) it was pointed out that :

By marriage her husband acquires no interest whatever in his wife's property. In short, the husband and wife are in the eyes of the Mussulman Law perfectly distinct and independent—each being entitled to the protection of the law against the other—so far as his or her rights of property are concerned, as if they were perfect strangers.

The result is that if a husband's real object in suing for restitution of conjugal rights is to covet his wife's property, is a Court of justice to encourage a covetous husband by subjecting his wife's person to his full and absolute control and forcing her to go under his domain both physically and mentally? Any reprehensible conduct on the husband's part if properly proved affords good ground for refusing to him the assistance of the Court. There is, as shown above, and as found by the District Judge, ample material to justify the conclusion that here, the present suit is not a bona fide suit. The wife has not seen his face in her life and it is very doubtful whether he had occasion to see her face after her marriage during all these years.

(3) [1909] 33 Mad. 22=3 I. C. 730=20 M. L. J. 1.

(4) [1790] 161 E. R. 466=1 Hag. Con. 37.

(5) [1886] 8 All. 149=(1886) A. W. N. 53 (F. B.).

(6) [1907] 34 Cal. 971.

(7) [1907] 29 All. 222=4 A. L. J. 60=(1907) A. W. N. 27.

(8) [1914] 12 A. L. J. 1065=25 I. C. 213.

(9) [1897] 21 Bom. 77.

His unbecoming vanquishment in the matter of identification of his wife in the proceedings before the executing Court, and the unconditional withdrawal from the hearing at which the appellant was forced to come out of her seclusion to give evidence in support of the genuineness of her signature on the execution application so amply borne out by order dated 27th July 1922, (Ex. A-10) clearly makes out the inner man and his innate tricky nature. It is not a genuine suit for the restitution of conjugal rights, but the real object is to obtain possession of the defendant's property and to molest her as soon as she goes under his control, and take revenge on her for her past refusal to associate with him. This must necessarily involve great danger to her life, health and safety and will surely affect her mentally also.

Apart from this aspect of the case, there is a very strong circumstance the significance of which does not seem to have been realized at all by anybody in the Courts below, although the plaintiff himself had placed that material on record. One Dr. Abdul Rahman of Hinganghat was examined as R. W. No. 1 after remand to prove that he treated the appellant as she suffered from hysteria on 24th November 1925. The object of this evidence was, in the words of the doctor himself, to show that "A woman above puberty recovers from hysteria when she gets a husband." This was meant to convey the idea that the appellant's mental condition was affected because of her abstention from cohabitation with her husband. In the cross-examination the doctor has admitted that he personally examined her and got information from the appellant direct. He also gave it as his opinion that "A strong hatred against a particular man may cause hysteria. Here who else but her husband would be the person towards whom she would entertain this strong hatred. Her deposition recorded by the late Khan Sahib Mohammad Hadi, Deputy Registrar (Ex. P-4) and its translation (Ex. A-D-4) clearly bears out the height of hatred, abhorrence or mental repugnance, which the appellant genuinely felt and feels towards him. In fact his attitude towards her has never been of a nature which would generate in her mind any feelings of love or affection towards him

On the contrary, everything had contributed towards widening the gulf of disaffection and positive dislike between them, and thus caused such an estrangement of feelings that it can safely be inferred that there could be no reasonable prospect, either in the near or remote future, of a reconciliation between them. The appellant's temperament has been so much affected by this that she has actually developed hysteria, and has thus disabled herself mentally from looking upon the plaintiff as a person who could give her any peace of mind or harmony of a marital life. To expect any conjugal bliss between such a married couple would be an absolute impossibility.

There is thus an invincible repugnance for the husband, not due to any obstinacy or caprice, resulting in a paralysis of the will, such as is consistent with and could reasonably be attributed only to the incompatibility of temperament of the couple, brought about by a long-standing enmity, contempt and hatred which the plaintiff's own conduct and covetousness has bred in her mind, ever since he successfully defeated her claim for mutation of her name against her grandfather's valuable villages in 1915-16 (Exs. R-8 and A-1). If he had then possessed the heart of a kind and affectionate husband, and shown any kind and affectionate regard for her feelings (especially as she must then presumably have either attained or been nearing her age of puberty being then about 14 or 15 years old and, therefore, in a position to make her own intelligent preference), it would have been a very wise step on his part to have at once attracted her heart and won over her affections, by abandoning all idea of setting up the alleged gift or agreement and the collusive and fraudulent award of interested persons like Abdul Jabbar (P. W. No. 3) and several others. That kind of attitude would have at once enlisted her sympathies, and the disastrous litigation in Suit No. 55 of 1915 and also Suit No. 3 of 1917 would not have been rendered necessary in order to unravel the grossest fraud practised on her grandfather, and it would not have even seen the light of day.

Her invincible repugnance for her husband's society became so hardened by

the plaintiff's subsequent unbending attitude that when she actually became major she thought that she had lawful grounds to withdraw herself from the society of her husband and refuse to have any concern with him, and thus determine for ever her own election to disavow the marriage tie, and affirm that she did not want to accept the improper marriage which she chose to characterize as having been 'fraudulently,' 'wickedly' or even 'carelessly' contracted during her infancy by her grandfather to her manifest disadvantage': cf. Ameer Ali's *Muhammadian Law*, Vol. 2, 4th Edition, pages 412-13. But unfortunately, she being caught in the clutches of the fiction of the law of *res judicata* is not allowed to prove in this suit that her grandfather made a sacrifice of her without any regard to her future welfare, to serve his own selfish purpose to which the plaintiff's father pandered by promising to get him married to some young wife in his extreme old age: a fact which she could establish in Suit No. 3 of 1917 as ably pointed out in this Court's decision in First Appeal No. 52 of 1919 (Ex. 1-D-17), as circumstance in proving the fraud practised in bringing about the award.

One has only to read the judgment of Suit No. 3 of 1917 and First Appeal No. 52 of 1919 to judge the full depth of delinquency to which plaintiff and his supporters had gone to deprive the appellant of her valuable estate which according to the plaintiff's own deposition as R. W. No. 7 is worth 3 or 4 lakhs. This covetousness ruled supreme and deadened all manner of finer sentiments of conjugal love and affection for this wife in the plaintiff's mind and naturally led him to neglect performance of the obligation which the marriage contract imposed upon him for the benefit of his wife under the Mahomedan Law. She must be deemed to have attained puberty in 1916 or at the most in March 1917. It was not till sometime towards the middle of 1921 when he made a false application under S. 552, Criminal Procedure Code to the Deputy Commissioner, Nagpur, or for the matter of that till 7th April 1925, i. e., after five years hard struggle to snatch away and swallow her estate, that he filed this suit and came forward with a show of affection for her and demanded

the assistance of the Court for obtaining a decree for restitution of conjugal rights as against her. She is at present 25 years old as held by the District Judge.

In view of this long neglect on plaintiff's part she is legally entitled to refuse to go to him and is within her legal rights in denying the plaintiff's claim to restitution of conjugal rights as against her. The Lahore High Court in *Nawab Bibi v. Allah Ditta* (10) disallowed the husband's claim in second appeal on this ground. In a case reported in *Aishan v. Sher Muhammad* (11) of the same High Court the subsequent offer to take her back made by a husband who had turned out his wife was treated as not a bona fide offer for purposes of S. 488, Criminal Procedure Code.

Where a wife is turned out or ill-treated so as to make it impossible for her to live with her husband or where the breach between the husband and wife is irremediable so that it is impossible for the latter to return to the former after many years' separation without leading to fresh trouble and dispute, she is entitled to maintenance by living separate from him: cf., *Nihal Kaur v. Bhagwan Singh* (12). This principle ought to apply equally to the case of a Hindu or a Mahomedan whether the question arises under S. 488, Criminal Procedure Code, or in a suit for restitution of conjugal rights. In *Babu Ram v. Kokia* (13) the husband had turned his wife out of doors many years ago because he suspected her chastity. The wife went to live with her uncle who supported her. Later on she applied for and obtained an order for maintenance under S. 488, Criminal Procedure Code, against her husband. During these proceedings, the husband still refused to take his wife back stating at the time that he suspected her chastity. When, however, the wife began to execute her decree for maintenance, the husband proceeded to file a suit for restitution of conjugal rights; it was held that in the above circumstance the inference was legitimate that the defen-

(10) A. I. R. 1924 Lah. 188.

(11) [1921] 22 Cr. L. J. 149=59 I. O. 853.

(12) [1914] 26 P. W. R. 1914=24 I. O. 962=170 P. L. R. 1914.

(13) A. I. R. 1924 All. 391=46 All. 210.

dant would have a reasonable apprehension of bodily injury if she returned to her husband, and that the Court below was right in refusing the plaintiff a decree.

The plaintiff as R. W. No. 7 has said in his cross-examination that he did not produce the documentary evidence which he possessed in order to show the appellant's willingness to come to him. In re-examination he explained that

the documentary evidence are letters. They are not produced as they would endanger her life.

This clearly shows that the plaintiff has in his possession and power means which will enable him to make her position as wife, to say the least, uncomfortable when she goes to his household, (unless he proves true to his words) and actually 'endangers her life.'

If under this state of the law and the state of extremely embittered feelings, the defendant were ordered to place herself in her husband's hands and go and live with him as husband and wife, there is every reasonable apprehension of her personal health and safety being jeopardized, and even her life being endangered by some ill-treatment or other attempts on plaintiff's part, even if those chances be considered totally eliminated in view of the apparent or superficial professions of good faith with which he seeks to press his present claim. There is no guarantee of the plaintiff refraining from putting such undue pressure on her, in course of time, as would induce her to part with the property which she wrested away from his hands; to say the least, for aught we know, the very seclusion or the strange and new environments in which she would be placed in her husband's household, would, in all probability, hold out a very strong incentive to the appellant to bring about her own self-effacement in order to escape the dire consequences of obeying life-long the decree of the civil Court for restitution of conjugal rights. There is, at any rate, a certainty of such a decree creating endless troubles and making the life of the appellant quite unbearable.

Under these circumstances I hold that the only legitimate conclusion which was deducible on the facts held proved by the Court of appeal was that there is a great imminent danger to the health, life or safety of the appellant, besides

the positive deprivation of her valuable estate of which she admittedly stood in constant dread, at the hands of the plaintiff-respondent. As the lower appellate Court failed to draw this legitimate inference from plaintiff-respondent's conduct, I am not prepared to uphold the decree appealed against.

I, therefore, allow the appeal and setting aside the decree of the Courts below dismiss the plaintiff's suit. Costs of both parties in all the three Courts inclusive of the costs incurred after remand shall be borne by plaintiff. I fix pleader's fee at Rs. 50 for each Court.

Under the provisions of S. 35 (3), Civil Procedure Code, I direct that the defendant shall get interest at 6 per cent. per annum on the amount of her costs in three Courts from the date of the decision of each Court until satisfaction, and recover it as part of her costs from the plaintiff-respondent.

R.D.

Appeal allowed.

A. I. R. 1927 Nagpur 145

FINDLAY, J. C.

Mahadeo and another—Defendants—Appellants.

v.

Somaji and another—Plaintiffs—Respondents.

Second Appeal No. 74 of 1926, Decided on 20th November 1926, from the decree of the Dist. J., Nagpur, D/- 9th November 1925, in Civil Appeal No. 122 of 1925.

(a) *Hindu Law—Alienation by guardian—Investment of proceeds in trading business—Stringent necessity of money for business must be proved.*

Where de facto guardian of Hindu minors sells family property and invests the proceeds in a trading business :

Held : that vital necessity for sacrificing the family property out-and-out for the purpose of the shop business must be proved. [P 146, C 2]

(b) *Limitation Act, Arts. 44 and 91—Suit to set aside sale by de facto guardian—Arts. 44 and 91 do not apply.*

Neither Art. 44 nor Art. 91 applies to a suit to set aside alienations by a de facto guardian. The suit can be brought within the ordinary period of 12 years. [P 147, C 1]

(c) *Limitation Act, S. 7—Suit to set aside alienation by de facto guardian—S. 7 does not apply.*

Section 7 does not apply to the case of a suit by minor to set aside alienation by a de facto guardian. [P 147, C 1]

W. R. Puranik—for Appellants.

A. V. Khare—for Respondents.

Judgment.—The facts of this case which have led to the present second appeal are sufficiently clear from the judgments of the two lower Courts. The Subordinate Judge, Second Class, held that the Defendant No. 3, Vithoba, was the de facto guardian of the minors plaintiffs, while their mother was the de jure guardian; that the farkhatnama dated 4th July 1914, had been duly executed and acted upon by Vithoba in favour of his deceased father Ramji; that the latter executed the will, dated 19th July 1909, in favour of the first plaintiff; that Vithoba had no interest in the properties concerned on the date of the execution of the sale-deed of 1920, that the plaintiffs and Defendant 3 were separate on that date; that the sale of 1920 was binding on the minors, inasmuch as the property was sold by the de facto guardian with the consent of the de jure guardian and that it was more in the interests of the minors to have sold the property than to have retained it; and that the suit was a collusive one as between the third defendant and the plaintiffs. On these findings the Subordinate Judge dismissed the plaintiffs' suit.

The latter appealed to the Court of the District Judge, Nagpur. The lower appellate Court confirmed the finding of the first Court on the point of separation of Vithoba. It, however, held that the fact of the mother and the three plaintiffs having gone to live with Vithoba after Ramji's death and their having had common trading transactions with him was insufficient to rebut the evidence of separation. The learned District Judge, however, further held that, although Vithoba as de facto manager had power to sell the house, this could only be exercised in case of necessity or for the benefit of the minor plaintiffs. He held that there had been no sufficient proof of necessity for the transaction and that, even if any benefit resulted therefrom, Vithoba who was separate shared therein. The learned District Judge agreed with the first Court that the suit was barred against the first plaintiff, but found that the other two plaintiffs were entitled to succeed. It was further found that there had been no sufficient proof of improvements,

while as regards the plea of collusion the Judge of the lower appellate Court held that although Vithoba was undoubtedly on the plaintiffs' side this fact per se did not necessarily imply that the suit was not brought bona fide in the interests of the minor plaintiffs. The District Judge accordingly granted the second and third plaintiffs a declaration that the sale was not binding on them and ordered the Defendants 1 and 2 to put them in possession of the house in suit.

The first and second defendants have come up on second appeal to this Court. The ground of appeal contesting the concurrent finding of fact that Vithoba had separated from Ramji and his family was not pressed in this Court. It has, however, been urged on the strength of the decision in *Kesheo Bharati v. Jagannath* (1) that the transaction by the de facto guardian was for the benefit of the minors and was, therefore, binding on them. The contention of the appellants in this connexion is that the house was in a dilapidated state, that it was found difficult or impossible to realize rent for it and that it was to the advantage of the minors to get rid of such a house and to use the money acquired by the sale in the common family business. It is no doubt true that the plaintiffs and their mother took shelter in Vithoba's house after Ramji's death and entered into common trading transactions with him, but what has not been proved is that there was any vital necessity for sacrificing the family property out and out for the purpose of the shop business. In such a case stringent proof is necessary, both as to the necessity for raising capital for the business in question as well as proof that the sale of the house was the only effective means of doing so. The mere fact that the business may have prospered in no way of itself is conclusive in this connexion. Moreover, in view of the fact that the separation of Vithoba is now admitted, very vital consideration which entirely militates against the appellants' case, is that, even supposing the money acquired was used with success in the common trading business, it, of necessity, follows that Vithoba, the separated member, who was the partner in the said business, must have shared

(1) A. I. R. 1926 Nag. 81=22 N.L. R. 5 (F.B).

in the benefit : cf. *Vithal Yeshwant v. Shivappa Mallappa* (2).

Again, it has been urged on behalf of the appellants that in any event they were entitled to compensation for improvements. It is perfectly obvious in this connexion that considerable confusion has arisen in the minds of both the Judges who have dealt with this case on the question of improvements. Improvements have to be distinguished from necessary running repairs and no such distinction has been made. No clear and specific evidence of improvements as such has been forthcoming, and it is quite clear that the Subordinate Judge, by a process of guess-work in view of the discrepancy between the price paid for the house and the present value of the house, as given in the plaint, concluded that there must have been such improvements. Any such line of reasoning entirely overlooks the vital consideration that the price at the sale of 1920 would obviously be low for the simple reason that the vendees must have known very well that they were clearly acquiring a doubtful title. I can see no reason for remand of the case on this question of improvements, for I am satisfied that the District Judge's finding of fact in this connexion is a sound and justifiable one. I need hardly point out too that if the Defendants 1 and 2 were to receive compensation for improvements, they would have to account also for any profits acquired in the transaction in question.

On the question of limitation, which was considered by the Courts below, it seems to me that both the lower Courts were wrong in applying Article 91 of the Limitation Act to the case. The sale having been made by a de facto guardian, so-called, neither Article 44 nor Article 91 applies and the suit can be brought within the ordinary period of 12 years. Even, if, however, did the three years' period of limitation apply, so far as the first plaintiff is concerned, I know of no authority for the view that the suit is barred as against the second and third plaintiffs. S. 7 of the Limitation Act does not seem to me to apply in the circumstances of the present case, but in any event, the point is a purely academic one in view of my finding above on the question of limitation.

(2) A. I. R. 1923 Bom. 265=47 Bom. 637.

It has further been urged on behalf of the appellants that the lower appellate Court erred in giving a decree to the second and third plaintiffs in respect of the entire house. Obviously the three plaintiffs have remained a joint Hindu family. The house in suit forms only one of the assets, and losses and equities would have to be adjusted between them. The defendants, who are strangers, cannot, in the circumstances, be allowed to remain in possession : cf. *Mohanlal v. Tekchand* (3).

On the question of collusion, I have nothing to add to the judgment of the learned District Judge. The mere fact of Vithoba obviously supporting the plaintiffs' case is in itself no proof that the suit is not a bona fide one brought in the interests of the minors.

These findings govern the appeal which is dismissed with costs. The appellants must bear the respondents' costs in the lower Courts as already ordered.

D.D.

Appeal dismissed.

(3) [1913] 9 N. L. R. 18=18 I. C. 826.

A. I. R. 1927 Nagpur 147

FINDLAY, J. C.

Manya—Appellant—Defendant.

v.

Sitaram and others—Plaintiffs—Respondents.

Appeal No. 78 of 1926, Decided on 30th November 1926, from the appellate decree of the Addl. Dist. J., Bhandara, D/- 28th November 1925.

(a) *Record of Rights—Presumption.*

When the entry in the Settlement records implies a permanent lease, the person contesting the permanent character of the lease must prove that it was merely an annual lease. [P 149, C 2]

(b) *Fishery—Grant of, creates interest in immovable property.*

Grant of lease for fishing creates an interest in immovable property : 14 N. L. R. 35, *Ref.*

[P 149, C 1, 2]

S. Y. Deshmukh—for Appellant.

P. A. Pandit—for Respondents.

Judgment.—Although the actual claim in this case is a petty one, it has given rise to a protracted litigation and certain questions involved are undoubtedly of importance. The plaintiffs Sitaram and four others are malguzars of mouza Pandhara Bodee (Bhandara) and own tank No. 115 therein : their case was that

they had let out the tank with a view to singhara cultivation for the Fasli year 1932 to defendant who, however, remained in illegal possession in 1933. They accordingly claimed an injunction restraining the defendant Manya from remaining in possession of the tank. Defendant admitted plaintiffs' ownership of the tank but denied the lease for the year 1932: he alleged, on the contrary, that the tank had been in his possession for some 35 years on a yearly rent of Rs. 7, i. e., from before the Napier Settlement. According to defendant, Dhondu, father of Plaintiff 1, had given him a perpetual lease of the tank on the rent stated and he had been in undisputed possession ever since. At the first trial of the suit, the Second Munsif, Bhandara, held that the story of perpetual lease was false largely because, while defendant said the lease had been given to him, his counsel said the original lease was given to defendant's father. In view of the vague and loose statements often made by the more ignorant class of litigant in this country, it was perhaps unsafe to attach much importance to this discrepancy in the pleadings; the discrepancy might well have been—so to speak—an innocent or inadvertent one. The Second Munsif, however, further pointed out that the khasra copies (Exhibits D-1 and D-2) for 1894-95 and 1916-17 respectively showed that there was only a yearly lease of the tank to defendant. Anyhow the original trial Court held that there was only a yearly letting of the tank and that singhara cultivation did not render defendant a tenant. Accordingly a decree in favour of the plaintiffs was passed. Defendant appealed to the Court of the Additional District Judge, Bhandara, who deemed the case on all fours with those of *Batloo v. Narainprasad* (1), and *Hari v. Wann* (2), and who was of opinion that mere singhara cultivation could make no right of tenancy. Accordingly the mere fact that defendant had held the tank for many years was, in the opinion of the Additional District Judge, of no avail and he accordingly dismissed the appeal.

These two decisions of the Courts below led to Second Appeal No. 43 of 1924, filed by the defendant in this Court. Kinkhede, A. J. C., therein, after

pointing out that there were insufficient and faulty pleadings as to the nature of the property or interest defendant enjoyed in the tank, pointed out that not only singhara cultivation but a right of fishery was included in defendant's use of the tank. The right of fishing—it was pointed out by the learned A. J. C.—amounted to the grant of an interest in immovable property: cf. *Sitaram v. Petia* (3). Such a right—although perhaps not capable of being acquired by prescription—might come into existence by grant or custom and such a grant might be presumed from long use: cf. *Rajrup Koer v. Abdul Hossein* (4). The case was accordingly remanded to the first Court for trial de novo.

As a result of this remand, further pleadings of the parties were recorded. A perpetual lease by Plaintiff 1's father Dhondu to defendant's father on Rs. 7 a year was pleaded, the object of the lease being singhara cultivation and fishing. Plaintiffs denied that any right of fishing was granted to defendant, but admitted that, in practice, he was allowed to take fish from the tank. Other pleas e. g., as to Dhondu's want of authority to give the lease, were offered, but these are of little or no importance now. The Subordinate Judge, 2nd Class, after taking into account certain further documentary evidence filed by defendant after the remand, held that, at the Gordon Settlement of 1916-17, it had been decided in connexion with the enquiry into the siwai income of the village that a right of non-ejectment had been created in favour of defendant. The long-continued possession and the fixed amount of the rent both pointed to the lease being a permanent one. Defendant, therefore, could not be ejected and the plaintiff's suit was dismissed.

An appeal by the plaintiffs in the Court of the Additional District Judge proved successful. The Judge of the lower appellate Court, after considering the evidence, oral and documentary, on record, held that defendant's father had obtained a yearly lease of the tank some 35 years ago for singhara and fishing purposes: he disbelieved the story of a perpetual lease and he further held that, in view of the decisions in 11 Nag. L. R.

(1) [1914] 11 N. L. R. 49=28 I. C. 869.

(2) [1915] 11 N. L. R. 122=31 I. C. 294.

(3) [1916] 14 N. L. R. 35=43 I. C. 962.

(4) [1880] 6 Cal. 394=7 I. A. 240=7 O. L. R. 529=4 Sar. 199 (P. C.).

49 and 122, quoted above, defendant's claim to hold the tank permanently could not be upheld. All that the defendant had was, in the opinion of the Additional District Judge, a license by way of annual permission to grow singhara and to fish in the tank. The judgment and decree of the Subordinate Judge were accordingly reversed and the plaintiffs' claim was decreed.

The defendant has now come upon second appeal to this Court. Much stress has been laid by his counsel on the effect of the entries made at the 1916-17 Settlement in respect of this tank. It is urged that the burden of proof was wrongly placed on defendant, that it was not for him to prove that there was a yearly lease but for plaintiffs to prove that the lease was not a permanent one. Let us turn to what actually occurred at the Gordon Settlement. Exhibit D-4, an extract from the connected wajib-ul-arz, contains the following entry:

Maniram Kahar pays Rs. 7 as rent for tank No. 115 and enjoys singharas and (income from) fishing from the time of the Settlement. He will not be ejected from the tank so long as he pays rent regularly.

Again, Exhibit D-3, copy of a report by the Assistant Settlement Officer, shows that the malguzar was obviously consulted in connexion with the enquiry into this item of siwai income, for the following entry occurs:

Singhara and fishing in tank.	Malguzar admits to be charging Rs. 7 a year from Mana Kahar for planting singhara and fishing in the tank near abadi since before the Settlement. Hence I would take it in extra income at Rs. 7.
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The proposal bears an endorsement showing it was accepted by the Settlement Officer. In view of the above evidence showing that the malguzar had been consulted, I am wholly unable to accept that the entries were made without due enquiry by the Settlement Officer.

It seems to me that the plaintiffs have wholly failed to discharge the burden which rested on them of showing that the above entries were made without due enquiry or were ultra vires. Prima facie, it would appear that this item of siwai income was one which the Settlement Officer was bound to enquire into. As I have already shown the malguzars were consulted, and, if they felt aggrieved by the above entries, they had the

remedy open to them under S. 80, Land Revenue Act, which came into force on 1st September 1917. Even under the Act of 1881, the provisions of Ss. 82 & 83 were available. They did not take advantage thereof and, in the circumstances, the burden lay on them of showing the entry had been made without due jurisdiction or enquiry. The evidence produced by plaintiffs as to the lease being a yearly one is of no weight whatever as against the Settlement entries referred to and the undoubted fact that defendant has held the tank for some 35 years on a fixed rent of Rs. 7 a year. Moreover, even the khasra entries for 1894-95 and 1913-14 (Exhibits D-1 and D-5) imply the idea of a permanent lease: cf. the entries in Remark column: "The tank is given every year to Mania on Rs. 7" and "The malguzar always receives Rs. 7 annually."

There is in this case no question of tenancy, but, as my learned brother Kinkhede, A. J. C., pointed out, the fact that the lease was granted partly for fishing undoubtedly creates an interest in immovable property and the long continued use together with the other evidence in defendant's favour amply justifies the presumption that there was a permanent grant of the tank to him for the double purpose of singhara cultivation. The burden of proof was undoubtedly wrongly laid by the Additional District Judge on the defendant, but however that burden lay, it is perfectly clear that there has been a total failure on plaintiffs' part to prove a yearly lease, while the evidence is overwhelmingly in favour of the lease being a permanent one. In these circumstances the defendant is not liable to ejectment. The judgment and decree appealed against are accordingly reversed and instead a decree will issue dismissing plaintiffs' suit. The plaintiffs respondents must bear defendant-appellant's costs in all Courts as well as their own.

D.D.

Appeal allowed.

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KINKHEDE, A. J. C.

Mulchand and another—Defendants 3 and 4—Appellants.

v.

Radhakisan and others—Plaintiffs 1 to 3 and Defendants 1, 2 and 5 to 8—Respondents.

First Appeal No. 15 of 1924, Decided on 23rd November 1926, from the decision of the Sub-J., Khandwa, D/- 13th October 1923, in Civil Suit No. 123 of 1922.

Transfer of Property Act, S. 74—Subrogation—Purchaser of equity of redemption paying prior mortgage cannot require subsequent mortgagee to redeem him by force of such purchase.

Before any person is entitled to the benefit of subrogation, he must pay up the mortgage debt. The doctrine of subrogation can never be permitted, where the application of it would work injustice to the rights of those having equal or superior equities. [P 153, C 2]

Where a mortgagor or owner of the equity of redemption or any encumbrancer redeems a prior charge which is his own debt or which by contract, express or implied, he is bound to discharge, he cannot keep such charge alive as against a puisne encumbrancer whose encumbrance he is also expressly or impliedly bound to discharge. [P 153, C 2]

A purchaser of equity of redemption bound under his purchase to pay off incumbrance on the property discharging a prior mortgage, cannot, when a puisne mortgagee seeks to enforce his mortgage, claim to be subrogated in place of the prior mortgagee and require the puisne mortgagee to redeem the prior mortgage paid off by him; 43 Cal. 69 and 33 All. 101 (F. B.), *Foll.* [P 153, C 2]

H. S. Gour and W. P. Puranik—for Appellants.

V. R. Pandit—for Respondents.

Judgment.—The appellants were Defendants Nos. 3 and 4 in the Court below. They were impleaded as parties to the suit based upon a mortgage dated 20th March 1911 (Exhibit P-4) executed in favour of one Gulabchand, the father of Plaintiffs-respondents Nos. 1 to 3 by one Raghu, son of Bhagu, and his mother Jasoda for a consideration of Rs. 3,000 with a condition of foreclosure. Raghu died before this suit which was instituted on 28-8-1922 leaving Sitia, Defendant No. 1, minor son, as his legal representative. Jasoda is Defendant No. 2. They are Respondents Nos. 4 and 5 in this appeal. Appellants-defendants Nos. 3 and 4's interest is described in the plaint as being that of subsequent purchasers of the mortgaged malik mak-

buza field as per sale deed dated 2nd July 1914 and that the Defendant No. 3 is also described as a subsequent purchaser of the mortgaged houses as per sale deed dated 8th June 1914. Respondent No. 6 Harprasad was impleaded as Defendant No. 5 in the lower Court in his capacity of a subsequent mortgagee of the mortgaged malik makbuza land as per mortgage deed dated 13th June 1914 (Exhibit D-3). Respondent No. 7 Shamal who was impleaded as Defendant No. 6 is the minor son of Ramchandra Kalal who had taken a subsequent mortgage dated 4th March 1914 of the houses covered by the mortgage in suit. Respondent No. 8 Shanker was Defendant No. 7 and was impleaded as subsequent purchaser of the mortgaged mango trees as per sale deed dated 22nd May 1914 and Respondent No. 9, who was Defendant No. 8 in the Court below, was similarly impleaded as the purchaser of the same mango trees as per sale deed dated 9th May 1914. The amount due to the plaintiffs on the basis of their mortgage dated 20th March 1911 (Exhibit P. 4) was Rs. 10,987-6-0 at the date of suit. Plaintiffs asked for a decree for foreclosure of the mortgaged property as against all these defendants.

Sitia being a minor his mother Yenibai has put in a written statement denying all knowledge of the transaction in suit. Defendant No. 2 remained absent and the case proceeded ex parte against her. Defendant No. 4 denied the plaintiffs' mortgage and its consideration and valid attestation. He admitted that he and Defendant No. 3 purchased the malik makbuza field in suit as per sale dated 2nd July 1914 (Exhibit D-1) and that the same was in their possession from the date of the said purchase. He however asserted that the deceased mortgagor Raghu had mortgaged the malik makbuza field to Ramchandra, the deceased father of Shamal, under a mortgage deed dated 2nd July 1908 (Exhibit D-2) for Rs. 1,500, and that the same was payable on 28th November 1908. That the said Ramchandra had also taken another mortgage dated 4th March 1914 (Exhibit D-4) in respect of the houses covered by the mortgage in suit. He pleaded that after the purchase of the malik makbuza field by himself and Defendant No. 3 they fully satisfied the mortgages in favour of Ramchandra and

Harprasad by payment of Rs. 6,400 in redemption of the mortgage dated 2nd July (Exhibit D-2) to Ramchandra and of Rs. 3,600 to Harprasad to redeem his mortgage dated 13th June 1914 (Exhibit D-3); each of these mortgagees Ramchandra and Harprasad are said to have passed receipts dated 8th May 1915 (Exhibits D-5 and D-6) in favour of Defendants 3 and 4 who are appellants before me. He therefore contended that he and Defendant No. 3 were entitled to claim prior mortgagee rights over the plaintiffs and entitled to use the mortgage dated 2nd July 1908 as a shield against the plaintiff's mortgage in case it be proved in the suit. A sum of Rs. 16,350 was claimed on the basis of the mortgage dated 2nd July 1908, and it was urged that the plaintiffs were not entitled to foreclose mortgaged property and acquire the possession over it even if they proved their mortgage unless they paid the amount due under the prior mortgage dated 2nd July 1908 (Exhibit D-2). I am not concerned with the defence of Defendants Nos. 7 and 8, but it is necessary to note the defence put in by Defendant No. 6's guardian through Mr. Ghate, pleader. He denied the execution of the plaintiffs' mortgage, its consideration and valid attestation. He admitted that he held the mortgage deed executed in his father's favour (Exhibit D-4) in respect of a house. It was also alleged that it appeared that his father held another mortgage dated 2nd July 1908 to which reference was made in the mortgage deed (Exhibit D-4). He urged that a decree for the sale of the mortgaged property be passed (evidently in lieu of foreclosure decree) in case plaintiffs' mortgage be proved. It was also added that the house property mortgaged with him was covered by the mortgage sued upon. Mr. Ghate further added that Defendant 6 did not then possess the mortgage deed dated 2nd July 1908 and presumed that the mortgage was probably redeemed.

In reply to the pleas of Defendant No. 3 which were adopted by Defendant No. 4, and the defence made on behalf of Defendant No. 6, plaintiffs through their pleader affirmed the validity of their own transaction and the binding character thereof against defendants who were subsequent transferees. They, however,

denied the execution and valid attestation of the alleged mortgage dated 2nd July 1908 in favour of Defendant No. 6's father and also its binding character on the ground that Raghu was a minor at the date of its execution. It was therefore alleged that the mortgage even if proved to have been executed by Raghu, was void ab initio. The alleged payment of Rs. 6,400 was also denied and the receipt dated 8th May 1915 (Exhibit D-5) was characterized as a forged document. It was pleaded that Defendants Nos. 3 and 4 did not acquire title to the mortgaged property by the alleged payment to Ramchandra and that they could not hold up the mortgage dated 2nd July 1908 as a shield against the plaintiff's mortgage. Firstly, because it was a void transaction; and secondly, because Defendants 3 and 4 as subsequent purchasers of the equity of redemption were bound to redeem all valid prior mortgages. The extent of mortgage debt being Rs. 16,350 on the basis of the mortgage dated 2nd July 1908 was also denied.

Issues were framed amongst which the following are material to this appeal:

* * * * *

2. Whether Raghu had executed the mortgage deed dated 2nd July 1908 in favour of Ramchand, father of Defendant No. 6?

(a) Was it validly attested and for consideration?

(b) Whether Raghu was a minor on 2nd July 1908 and so the alleged prior mortgage of that date was void?

3. Whether the Defendants Nos. 3 and 4 paid the sum of Rs. 6,400 to Ramchand on 8th May 1915 and redeemed the mortgage dated 2nd July 1908. If so, whether the Defendants Nos. 3 and 4 are entitled to hold the mortgage of 1908 as a shield against the plaintiffs' claim.

4. What amount is legally due on the mortgage dated 2nd July 1908.

The lower Court held that the mortgage (Ex. D-2) was duly executed by Raghu for consideration; that plaintiffs failed to prove that Raghu was incompetent to execute the mortgage of 1908; that the receipt (Ex. D-5), dated 8th May 1915, passed by Ramchandra was genuine, but that it evidenced a merely nominal transaction; that the appellants Mulchand and Onkar obtained the sale deed burdened with the mortgage debt owed to the plaintiffs; that it was not satisfactorily established that Defendants Nos. 3 and 4 really paid Rs. 6,400 to Ramchand as alleged by them for redeeming the prior mortgage. In this

view the lower Court thought the plaintiffs could not be compelled to redeem the prior mortgage which the Defendants Nos. 3 and 4 alleged they had discharged. That inasmuch as the Defendants 3 and 4 purchased field worth about Rs. 12,000 for a price of Rs. 3,000 only, they must be deemed to have in pursuance of the obligation undertaken to satisfy the mortgages subsisting over the property discharged their own obligation as purchasers of the equity of redemption. Accordingly plaintiffs' claim for a foreclosure was decreed against all the defendants.

It is against this decree that the Defendants 3 and 4 have preferred the present appeal. They have valued their relief in appeal at Rs. 6,400 being the amount which they alleged they paid to the prior mortgagee and which they claim from the plaintiffs-respondents. The learned counsel who argued the appeal on behalf of the appellants on being asked to value the relief in appeal properly and pay Court-fee in respect thereof, confined the claim of Rs. 6,400 only and abandoned the claim for interest subsequent to 8th May 1915 by way of set-off against the income of mortgaged fields in his possession. The prayer in the appeal is that the plaintiffs' claim be decreed subject to the rights of the appellants' prior mortgage which the plaintiffs should be compelled to redeem before they proceed to realize their own mortgage together with all costs of the suit. It will thus be seen that the decree as passed by the lower Court is sought to be modified by getting it declared that it is subject to the rights of the appellants under the prior mortgage and that the plaintiffs should not proceed to realize their own mortgage unless they first redeem the appellants.

The only questions therefore to be considered in this appeal are the following: (1) Whether the appellants redeemed the prior mortgage (Ex. D-2) by payment of Rs. 6,400 to the deceased mortgagee Ramchand and obtained receipt (Ex. D-5), dated 8th May 1915, from him. (2) If so whether they are assignees of the prior mortgagee and as such entitled to use the prior mortgage (Ex. D-2) as a shield against the present plaintiff's mortgage (Ex. P-4).

The learned counsel for the appellant being fully conscious of the weakness of

his evidence as to the alleged payment of Rs. 6,400 to Ramchand attempted to put that matter in the background by arguing that the question was whether the discharge which his client purported to secure from the prior mortgagee as per Ex. D-5 operated as an assignment by the prior mortgagee in their favour especially as the prior mortgagee's legal representative was a party to the suit and desired that effect be given to the assignment, and that the question whether the assignment was for the consideration or not was immaterial for the purposes of this case. He relied upon the observations of their Lordships of the Privy Council in *Bhagwat Dayal Singh v. Debi Dayal Sahu* (1). The argument as it stands appears very plausible, but if we examine the basis of it in the light of the pleadings and the evidence on record, its weakness is at once exposed in view of the circumstances under which either the purchase or the so-called redemption of the prior mortgage is said to have taken place. The argument that the assignor is a party to the suit and maintaining the transaction asks that effect be given to it is wholly unsupported by the pleadings and the stand taken by or on behalf of Defendant No. 6. We cannot forget that Defendant No. 6 was impleaded in this suit in his capacity of a subsequent mortgagee interested in redeeming the mortgage in suit, and not as a holder of a prior mortgage dated 2nd July 1908 (Ex. D-2). Nor were Defendants Nos. 3 and 4 impleaded in any capacity other than that of subsequent purchasers. Plaintiffs also would not recognize their character or of Defendant No. 6 as that of a prior mortgagee in relation to their own.

The Defendants Nos. 3 and 4 had made an application on 28th February 1923 for the examination of Gangabai mother of Defendant No. 6 on commission as a pardanashin lady and the plaintiffs' pleader had no objection to the granting of the application, and the Court accordingly ordered on 5th April 1923 a commission to issue for her examination. The Commissioner's proceedings show that a day was fixed by him for the examination of the lady at the residence of the pleader for Defendants Nos. 3

(1) [1908] 35 Cal. 420=35 I. A. 48=7 C. L. J. 335=12 C. W. N. 393 (P. C.).

and 4 who apparently had undertaken to produce the witness; but the witness was not produced, and it was given out that the witness would be produced in Court at Khandwa if defendants at all wish to examine her as a witness. The commission was accordingly returned unexecuted on 12-6-23. Even though the day of hearing of defendant's evidence in the Court was fixed for 12-7-23 and they examined 4 witnesses on that day and the Defendants 3 and 4 were examined at the next hearing dated 6-8-23 as D. W. 6 and D. W. 7 and the case was voluntarily closed by the parties on that date, no attempt was made to examine Gangabai in Court either as witness for Defendants 3 and 4 or for Defendant No. 6. There is thus absolutely nothing to show that Defendant 6 supported the so-called assignment of the prior mortgage in favour of the appellants and wished that the same be given effect to. The present case therefore cannot come within the principle of the Privy Council cases above referred to. Moreover, the observations of their Lordships of the Privy Council strictly apply to a case of an inadequacy of consideration and not to absence of consideration which on the findings of the first Court appears to be the case here. I am not prepared to belittle the importance or the bearing which the question of actual payment to the prior mortgagee of the sum of Rs. 6,400 in full satisfaction of his mortgage has upon the question of the appellants' right to use that mortgage as a shield against the plaintiffs' mortgage.

In *Gurdeo Singh v. Chandrikah Singh* (2), Justice Mookerjee quoted the following from *Ellishworth v. Lockwood* (3):

Subrogation or substitution by operation of law to the rights and interests of the mortgagee in the land is by redemption, and redemption is payment of the mortgage debt after forfeiture by the terms of the mortgage contract, so that really the subrogation or substitution by operation of law arises or proceeds on the theory that the mortgage debt *is paid*. If the holder of a bond assigned it to a party claiming a right to redeem, the latter is subrogated by the assignment to the mortgage debt and mortgage security and to the instrument evidencing such debt and security, and there is no room or occasion for subrogation by operation of law.

I have underlined (italicized) the important words. It therefore follows

(2) [1909] 36 Cal. 193=1 I. C. 913=5 C. L. J. 611.

(3) [1870] 42 N. Y. 89.

that before any person is entitled to the benefit of subrogation he must *pay up* the mortgage debt.

The doctrine of subrogation is a doctrine of equity jurisprudence. It does not depend on privity of contract, express or implied, except in so far as the equity may be supposed to be imported into the transaction, and thus raise a contract by implication. It is founded on the facts and circumstances of each particular case, and on the principles of natural justice. While, therefore, the doctrine will be applied in general wherever any person other than a mere volunteer pays a debt on demand, which in equity or good conscience should have been satisfied by another, or where the liability of one person is discharged out of a fund belonging to another, or where one person is compelled for his own protection or that of some interest which he represents, to pay a debt for which another is primarily liable, or wherever a denial of the right would be contrary to equity and good conscience, the doctrine will never be permitted, where the application of it would work injustice to the rights of those having equal or superior equities:

Bisseswar Prosad v. Lala Sarnam Singh (4). In *Surjiram Marwari v. Barhamdeo Persad* (5) it was ruled by the Calcutta High Court that if a mortgagor or owner of the equity of redemption or any encumbrancer redeems a prior charge which is his own debt or which by contract, express or implied, he is bound to discharge, he cannot keep such charge alive as against a puisne encumbrancer whose encumbrance he is also expressly or impliedly bound to discharge. Jones in his *Treatise on Mortgages* (Sixth Edition, Vol. I. S. 876) thus formulates the test of the right of subrogation:

The test of the right of subrogation is found in answer to the inquiry whether the person who paid the mortgage debt is the one whose duty it was to pay it first of all; if the debt was not primarily his, and he only occupied the position of a surety to the mortgagor, he is entitled to be subrogated to the position of the mortgagee when he has paid the debt; but if the debt is the debt of the person who paid it, or is a debt which he has covenanted to pay, his payment of it raises no right of subrogation, but is simply a performance of his own obligation or covenant.

These principles are well founded on equity and justice and if applied to the case before me completely put the appellants out of Court. This is the view which was taken in *Har Shyam Chowdhuri v. Shyam Lal Sahu* (6) and *Muhammad Sidiq v. Ghaus Muhammad*

(4) [1907] 6 C. L. J. 134.

(5) [1905] 2 C. L. J. 288.

(6) [1916] 43 Cal. 69=22 C. L. J. 227=31 I. C. 22=20 C. W. N. 601.

(7), where part of the consideration was left with the purchaser for the discharge of the prior encumbrances and the purchaser who satisfied the prior encumbrance but did not satisfy the second encumbrance was not allowed to set up the prior mortgage redeemed by him as a shield against the claim of the puisne mortgagee whom he was also bound to pay; and also by this Court in *Bhagwant v. Beharilal* (Second Appeal No. 327-B of 1916).

The appellant Mulchand in his deposition as D. W. 6 had clearly admitted and his statement on this point is also borne out by other evidence on record that the field in question was worth Rs. 10,000 or Rs. 12,000. The consideration mentioned in the sale deed dated 2-7-1914 (Exhibit D-1) is only Rs. 3,000. This clearly shows that the purchasers purchased property at a low value in order that there might be sufficient margin left in their hands to pay off the encumbrances to which it was then subject. If the property was admittedly worth Rs. 12,000 one cannot understand why the mortgagor would sell it only for Rs. 3,000 unless the intention of the parties to the sale was that the vendees should satisfy the encumbrances and the vendor should get what represented only the price of mere equity of redemption. In other words this circumstance affords clear indication of an implied agreement or undertaking to repay the encumbrances on the part of the vendees. The alleged payment or satisfaction of the prior encumbrance by the appellants would under such circumstances amount to the performance by them of their own obligation to pay the debts which, under the circumstances, above referred to they must have either undertaken or bound themselves to satisfy within the meaning of the rule enunciated above. In view of the admission by Mulchand as D. W. 6 that he was informed of the mortgages of Ramchand, I cannot attach much importance to the omission of all express mention of the encumbrances which were subsisting at the time in the sale deed (Exhibit D-1) as against the mortgaged property. In the mortgage deed in suit (Exhibit P-4) we find the mortgagor falsely stating that the property was not previously encumbered, although

as a matter of fact it was then under a prior mortgage dated 2-7-1908 as per Exhibit D-2. Such omissions or assertions have no value, under such circumstances.

Even assuming therefore that the appellants paid Rs. 6,400 in full redemption of the prior mortgage (Exhibit D-2) to Ramchandra, that payment does not entitle them to claim the benefit of the doctrine of subrogation as against the plaintiffs whom they have not yet paid. In this view of the case it is unnecessary for me to examine minutely the evidence both oral and documentary which the appellants have adduced in support of their plea of the alleged payment. That evidence has been discredited by the Judge who recorded it and I may say so for very good reasons. In view of the circumstance that Mulchand's mother was married by pat to Ramchandra and that he (Mulchand) lived and messed with Ramchandra and that he and Ramchandra's son Shamlal are holding the property of Ramchandra as joint owners, the story of actual payment to Ramchand at Ganeshram Mahajan's shop at Burhanpur with all the formalities, appears to be a pure invention. Then again the receipt (Exhibit D-5) does not specify the amount said to have been paid to Ramchand. Further the omission to get Ganeshram's Gumashta Ramprasad, who was present at the shop at the time of the alleged payment, to attest the receipt in token of his having witnessed the payment and the passing of the receipt by Ramchandra also, goes a great way towards showing that the alleged payment if any was not made and the receipt was only nominal. The mere circumstance therefore that the document (Exhibit D-2) comes from the custody of the appellants and that too without any endorsement of satisfaction does not establish their plea of satisfaction.

At this stage I may mention one significant fact which perusal of the record has brought to light. Defendants examined their witnesses Nos. 1 to 5 on 12-7-1923. The oral evidence as it then stood was very shaky and discrepant, and the story of the alleged payment of Rs. 6,400 to Ramchandra an old man of very advanced age must have struck everybody concerned as highly improbable. That day the pleader who con-

(7) [1911] 33 All. 101=7 I. O. 200=7 A. L. J. 914 (F. B.).

ducted the case on behalf of Shamlal Defendant No. 6 purports to have made an application under his own signature requesting the Court to allow an amendment of his pleadings by permitting him to raise a new plea couched in the following words:

That in case the payment by Defendants 3 and 4 of the mortgage money to the father of this defendant du under the latter's mortgage dated 2-7-1908 is not held proved for any reason, this defendant will stand as a prior mortgagee so far as the mortgaged malik makbuzi field is concerned. In that case the plaintiffs, even if they prove their mortgage, will not be entitled to foreclose unless and until they redeem that mortgage.

This plea clearly shows that the evidence of the alleged payment was wholly insufficient and unconvincing. In the absence of any order allowing the amendment I infer that the Judge must have thought that this was nothing but a dodge and could not be allowed at the late stage of the case.

For all these reasons I think the decree of the lower Court as passed is correct and needs no variation at the instance of the Appellants-Defendants 3 and 4. Although defendant Shamlal was impleaded as a party to this appeal, he did not prefer any cross-objections. Apparently he was satisfied with the decree as passed and desired no variation in his own interest.

The appeal therefore fails and is dismissed with costs.

D.D. *Appeal dismissed.*

A. I. R. 1927 Nagpur 155

FINDLAY, J. C.

Dadu Khushiram—Plaintiff—Applicant.

v.

Horilal Kasira—Defendant—Non-applicant.

Civil Revision No. 195 of 1926, Decided on 16th December 1926.

Contract Act, S. 23—Loan for gambling—Place of gambling not proved to be public—Money advanced is recoverable.

Where there is no proof that the gambling for which a loan is advanced is going on in a public place—on the contrary, it was apparently being conducted in a private house—and there is nothing to show that the play was being conducted for purposes of profit by the owner of the house, the money lent is recoverable, as not necessarily being for an illegal purpose: 5 All. 443 and 7 Mad. 301, *Foll.* [P 155 C 2]

W. R. Puranik—for Applicant.

V. R. Dhok—for Non-applicant.

Order.—The plaintiff-appellant, *Dadu Khushiram*, sued the defendant-non-applicant, *Horilal Kasira*, in the Court of small Causes, Seoni, for recovery of a sum of Rs. 146-4-0 said to have been borrowed by the latter. The defence was that the loan was, in reality, taken by one *Lakhmichand* in the defendant's presence and that it had been borrowed by *Lakhmichand* for a gambling purpose. The lower Court found that the loan had actually been taken for a gambling purpose by the defendant, but it dismissed the suit as it was of opinion that the consideration was illegal under S. 23 of the Indian Contract Act.

It is urged on behalf of the applicant that the findings of the Subordinate Judge go beyond the pleadings on record and that, in view of the defendant's denial of having taken the loan at all as well as of the lower Court's finding to the contrary, the plaintiff was entitled to a decree. After perusing the evidence and statements on record, I entertain not the slightest doubt but that the defendant, on the day he took the loan, was engaged in gambling and that the plaintiff knew perfectly well that the loan was taken during play for the purpose of carrying on the latter.

I am of opinion, however, that in the circumstances of the present case the consideration cannot be held to have been for an object forbidden by law. There is no proof that the gambling was going on in a public place; on the contrary, it was apparently being conducted in a private house and there is nothing to show that the play was being conducted for purposes of profit by the owner of the house. In those circumstances I am of opinion that the money lent to enable the non-applicant to continue gambling is recoverable, as not necessarily being for an illegal purpose, cf. *Pringle v. Jafar Khan* (1) and *Subbaraya v. Devindra* (2).

In the circumstances of the case, however, I do not think the plaintiff-applicant is entitled to any interest and I am further of opinion that the parties should bear their own costs in both Courts. I, therefore, reverse the judgment and decree passed by the lower Court and instead give a decree for Rs. 138 in favour of the plaintiff-applicant.

R.D.

Decree reversed.

(1) [1883] 5 All. 443=(1883) A. W. N. 68.

(2) [1884] 7 Mad. 301.

* A. I. R. 1927 Nagpur 156

HALLIFAX AND PRIDEAUX, A. J. Cs.

Vithaldas—Plaintiff—Applicant.

v.

Gulam Ahmad and another—Defendants—Non-applicants.

Civil Revision Application No. 136-B of 1925, Decided on 5th October 1926, from the order of the Addl. Dist. J., West Berar, Akola, D/- 29th June 1925, in Civil Appeal No. 82 of 1925.

* *Court Fees Act, S. 7 (xi) (cc)*—*Tenant holding over refusing to vacate after notice to quit—Suit to eject falls under S. 7 (xi) (cc) and not S. 7 (v) (e)*: **20 N. L. R. 124, Overruled.**

Although a tenant or a tenant holding over is a trespasser and not a tenant of any one kind after he has refused to comply with a proper notice to quit, the claim in a suit for ejectment of such a tenant must be regarded with reference to the facts existing when the cause of action accrued and not to the state of things when the suit was filed. Up to the moment he gives rise to a cause of action by refusing to quit on demand, a tenant is still a tenant, and that is the point of time to which the suit for his ejectment in consequence of that refusal must be referred. Hence a suit to eject such a tenant comes under S. 7 (xi) (cc) and not S. 7 (v) (e): **20 N. L. R. 124, Overruled.** [P 156 C 1]

A. V. Khare and Pendharkar—for Applicant.

Abdul Razak—for Non-applicants.

Order.—The question referred for the decision of the Bench is whether the Court-fee to be paid on the claim for possession of a house which is included in the plaint is to be calculated on the market-value of the house under Cl. v (e) of S. 7 of the Court-fees Act or on the rent payable for the year next before the institution of the suit under Cl. xi (cc) of the same section.

The plaintiff sued for possession of the house and arrears of rent on the following allegations: On the 12th of March 1908 he let it to Gulam Husen, father of the two defendants, for eleven months at a rent of two rupees a month, and Gulam Husen executed what is called a rent-note stating those terms. He continued to occupy the house on the same terms till his death on the 17th of August 1916 and then the first defendant Gulam Ahmad agreed to continue to do so, and did so with his brother the second defendant. Thereafter they paid no rent and were frequently told to pay up or quit. Eventually the plaintiff gave them a written notice on the 4th of December 1923 to quit at the end of the month,

but they failed to do so. The present suit was therefore filed on the 19th of February 1924 for the recovery of possession from the defendants and for Rs. 70 as the rent for the last two years and eleven months.

The calculation of the Court-fee payable on the claim for possession purports to be made under Cl. xi (cc) of S. 7 of the Court-fees Act, the claim being treated as one for the recovery of immovable property from a tenant holding over after the determination of the tenancy. In that case the basis for the calculation of the Court-fee is the rent payable for the year next before the date of presenting the plaint, that is Rs. 24. In the plaint however it is stated that the Court fee is based on the rent for two years, and even that is put down as Rs. 96, which is the rent for four years.

The defendants raised the plea that the plaint was not sufficiently stamped, as the Court-fee payable on the claim for possession should be calculated on the market-value of the house under Cl. v (e) of S. 7. This is perhaps the commonest of the many pleas that are invariably taken just because they are there to take without any thought of the profit or loss resulting from their success. The defendants could not possibly get any advantage out of the payment of a higher fee by the plaintiff, even if he failed in his suit and would have to pay it themselves if he succeeded. There can no objection to vigilant defendants looking after the interests of the public revenues, even at their own expense, but it would ordinarily be wiser to leave that to the Court, whose business it is. These defendants not only took the plea and pressed it successfully, but they contested the plaintiff's appeal against the order on it and have contested his application for revision of the appellate order in this Court, and also in both the lower Courts they urged and tried to prove that the market-value of the house was higher than it was found to be.

It has been held in both the Courts below, on the authority of this Court's ruling in *Champat v. Balakdas* (1), that the Court-fee on the claim for possession is payable on the market-value of the house under Cl. v (e) of S. 7 of the Court-fees Act, not on one year's rent under Cl. xi (cc) of that section. The plaintiff

(1) A.I.R. 1925 Nag. 131=20 N.L.R. 124.

contends that that ruling is mistaken and has applied for revision of the order, having obtained an extension of the time within which the balance of Court-fee is to be paid till the case has been decided. One of us doubted the correctness of the view set out in *Champat v. Balakdas* (1) and accordingly referred the case to a Bench.

The view taken in the case mentioned was that a tenant by express disagreement became a trespasser and not a tenant holding over as soon as he refused to comply with a proper notice to quit. It was accordingly held that a suit for recovery of the land filed after his refusal was not a suit against a tenant holding over and Court-fees must be paid according to Cl. v (e) of S. 7 of the Act.

It is undoubtedly correct to say that a tenant or a tenant holding over is a trespasser and not a tenant of any kind after he has refused to comply with a proper notice to quit. But the claim in a suit must be regarded with reference to the facts existing when the cause of action accrued, not to the state of things when the suit was filed. Up to the moment he gives rise to a cause of action by refusing to quit on demand a tenant is still a tenant, and that is the point of time to which the suit for his ejection in consequence of that refusal must be referred. If it were correct to look at the facts as they stood when the suit was filed in this connexion, there could be no such thing as a suit for the ejection of a tenant, and Cl. xi (cc) of S. 7 of the Court-fees Act, which was added to it in 1905, would be futile, along with practically all the provisions of the law in regard to the ejection of tenants.

A good deal has been said about the difference between a tenant of the ordinary kind, that is one by express agreement, and a tenant holding over, but the matter is irrelevant because Cl. xi (cc) includes tenants holding over in the term "tenant." The question of the proper definition of a tenant holding over arose, or was thought to arise, in the ruling under discussion, because our learned brother was examining the position of the defendant after his refusal to quit; at that time he was certainly not a tenant by express agreement and it was obviously correct to hold that he was not a tenant holding over, according to the definition in Wharton's Law Lexicon there quoted.

But in our view it is not the position of the defendant after his refusal to quit that is in question but his position up to that refusal.

We hold accordingly that the Court-fee payable on the claim for possession of the house should be calculated on Rs. 24, the rent payable according to the plaint for the year next before it was presented. The case will be returned with this statement of opinion.

D.D.

Case returned.

A. I. R. 1927 Nagpur 157

FINDLAY, J. C.

Bhikarilal and another—Defendants 5 and 6—Appellants.

v.

Ramdin and another—Plaintiffs—Respondents.

Second Appeal No. 76 of 1926, Decided on 23rd November 1926, from the decree of the Dist. J., Nagpur, D/- 14th December 1925, in Civil Appeal No. 148 of 1925.

Transfer of Property Act, S. 53—Undue preference is not covered by S. 53—Intention of parties is the test.

Undue preference to a creditor does not necessarily fall within S. 53. To determine whether a transaction is fraudulent or not, the crucial test is the intention of parties.

[P 157 C 2; P 158 C 1]

D. T. Mangalmoorti—for Appellants.

M. V. Abhyankar and B. R. Mandlikar—for Respondents.

Judgment.—The facts of this case have been fully stated in the judgments of the two lower Courts. The appellants, while so far accepting the findings of fact arrived at therein, have urged that, in any event, Rs. 141-10-9 of the consideration of the sale-deed was on account of old debt, while the balance of Rs. 158-9-3 paid before the Sub-Registrar was subsequently taken back by Defendant 5. On these findings it has been urged that, at the most, what had happened was that undue preference was shown to a single creditor: cf. *Musabar Sahu v. Lala Hakim Lal* (1), and *Mina Kumari Bibi v. Bijoy Singh Dudhuria* (2).

The legal proposition that undue preference to a creditor does not necessarily fall within S. 53 of the Transfer of Property Act, was not seriously disputed on behalf of the respondents. But what was

(1) [1916] 43 Cal. 521=32 I. C. 343=43 I. A. 104 (P.C.).

(2) [1917] 44 Cal. 662=40 I. C. 242=44 I. A. 172 (P.C.).

argued was that the real crucial point in a case like the present concerns what was the real intention of the parties to the deed. On this point, I think, there can be no possible doubt in the circumstances of the present case. Appellant 1 was the maternal uncle of the minors; the money paid before the Sub-Registrar was subsequently taken back; the house was worth more than the price purported to to have been paid for it; possession remained with Defendants 1—4 even after the sale; the expenses of the objection proceeding were debited to the Defendant 1; and from each and every point of view, the transaction has been held by both the lower Courts to be redolent of fraud. The mere fact that the appellant No. 1 was one of the creditors, particularly keeping in mind his relationship to the parties, does not necessarily imply that the house was transferred on account of his debt and in order to give him an undue preference as compared with other creditors. The circumstances of the case all, in short, go to show that there was no intention of the parties to this fraudulent and colourable sale-deed that title should pass to the vendees, and, on this view of the case, the appellants are obviously out of Court.

The appeal is accordingly dismissed. The appellants must bear the respondents' costs in this Court. Costs in the lower Courts as already ordered.

G.B.

*Appeal dismissed.***A. I. R. 1927 Nagpur 158**

FINDLAY, J. C.

Mt. Gajabai and another—Defendants 1 and 3—Appellants.

v.

Purshottam and others—Defendants—Respondents.

Second Appeal No. 286-B of 1925, Decided on 30th November 1926, from the decree of the Addl. Dist. J., Yeotmal, D/- 24th April 1925, in Civil Appeal No. 947 of 1925.

(a) *Practice—Appeal—Trial Court influenced by witness' demeanour—First appellate Court can come to a different conclusion.*

It is open to the first appellate Court to come to a different decision from the first Court on the question of fact involved even though the trial Court was influenced by the demeanour of the witness in coming to the conclusion arrived at. [P 159 C 1]

(b) *Possession—Long and continued possession—Presumption of ownership arises although origin not known.*

Although origin of possession is not known, long and continued possession will raise a presumption of ownership: 10 N. L. R. 188, *Rel. on.* [P 159 C 2]

A. V. Khare and W. B. Pendharkar—for Appellants.

M. R. Bobde—for Respondents.

Judgment.—The plaintiffs Mainabai alias Girjabai, and Sundrabai sued the defendants Gujabai, Laxmi, Kesho Appaji, Vithoba, Sitaram and Champat in the Court of the Subordinate Judge, Darwaha, for possession of a small site, 30 by 14 cubits, with a chhapri on it situated in mouza Darwaha. Their case was that the site belonged to their deceased father, Balwant Rao, and that after the death of his widow Yamunabai they became owners thereof by right of inheritance. Defendant 1 pleaded that the site belonged to her father and had been so in her possession for over 50 years. Defendant 2 admitted plaintiffs' claim, while Defendant 3's plea was that the site was his ancestral property. The suit proceeded ex parte against the other defendants. On the issues which arose on the pleadings of the parties, the Subordinate Judge came to the following findings:

(a) That the site and structure on it were not Balwant Rao's ancestral property.

(b) That Yamunabai had not been in possession thereof, nor had allowed Defendant 1 to live on the subject as a licensee.

(c) That Yamunabai died about November 1921.

(d) That defendants have been in possession for 50 or 55 years but not as owners.

The plaintiffs' claim was accordingly dismissed and they appealed to the Court of the Addl. Dist. Judge, Yeotmal.

The Judge of the lower appellate Court differed in his view of the oral evidence from the Subordinate Judge, in particular as regards witnesses like Govind, Bapu, Maroti and Ganesh (P. Ws. 4, 6, 7 and 8), who had been disbelieved by the Subordinate Judge because they were residents of other villages. The Additional District Judge gave reasons why these men were likely to have local knowledge of the site and held that on their and other evidence there was sufficient material for holding that Balwant Rao was the owner of the site. He further held that there was sufficient evidence to justify the finding that Mt. Gujabai had constructed the house with Yamunabai's permission. On

these and connected findings the lower appellate Court reversed the Judgment of the Subordinate Judge and gave a decree for possession of the site only, less the superstructure alleged to exist on it.

It has been urged on behalf of the appellants (defendants) Gujabai and Kesho Appaji that the Additional District Judge was wrong in upsetting the finding of fact arrived at by the Subordinate Judge, viz., that Balwant Rao was not the owner of the subject, particularly in view of the fact that the Judge of the first Court particularly commended on the demeanour of Mt. Gujabai and accepted her as a true witness. I have been referred to the decision of their Lordships of the Privy Council in *Bombay Cotton Manufacturing Co. v. Motilal Shivalal* (1) in this connexion, but, in my opinion, the decision of the lower appellate Court cannot be impugned on this ground. It was undoubtedly open to the said Court to come to a different decision from the first Court on the question of fact involved and that Court has given primarily satisfactory reasons for so doing.

Again, my attention has been drawn to the remarks in para. 5 of the lower appellate Court's judgment. Although it is true that title can be acquired by prescription in the case of a site like the present one in addition to the other three methods mentioned by the Subordinate Judge, it has been pointed out that for the factor of adverse possession to come into play, there must be such adverse possession against a specific person or persons. In this case it is urged that the adverse possession could only be against Government and that in any event such slender user of the land as occurred could not in any event amount to adverse possession cf. *Radhikadas v. Harmohanlal* (2). In this connexion my attention has also been called to the rules for assigning building sites in villages, contained in the Revenue Manual, Berar, Vol. I, p. 99, and it has been contended on behalf of the appellants that they had no chance of meeting the new case which was made out for them in the lower appellate Court. As I read the lower appellate Court's judgment, however, that Court did not definitely find that ownership had been ac-

quired by adverse possession. What the Additional District Judge did find was that on the evidence on record it was impossible to say how Balwant Rao's ownership was acquired but nevertheless that the evidence went to show long-continued possession which, in turn, raised a presumption of ownership: cf. *Sambhasheo v. Mahadeo* (3). Nor can I see that there is any room for the argument that the statements of the witnesses, whom the Additional District Judge relied upon, were in reality "opinion evidence" to the effect that Balwant Rao was owner. On the contrary, the witnesses deposed to facts, from which the lower appellate Court has deduced the presumption of ownership. It is no easy matter to lay down any exact rules as to the quantum of evidence necessary to establish ownership in a case like the present: cf. *Inayat Husen v. Ali Husen* (4), but on the whole it seems to me that there are insufficient grounds to permit of this Court interfering with the finding of fact arrived at by the Additional District Judge as to Balwant Rao's possession and ownership.

As regards the question of Mt. Gujabai constructing the hut as a licensee, it was open to the lower appellate Court to disbelieve that witness and it has given strong reasons for doing so. In any event the onus of proving that the defendant was not a licensee was on her and it has clearly not been discharged. Still further this question is of only academic importance because defendants' own evidence would show that the house was constructed after Balwant Rao's death, and limitation would not run against the reversioners.

These findings dispose of the appeal which is dismissed. Appellants must bear the respondents' costs. Costs in the lower Courts as already ordered.

G.B.

Appeal dismissed.

(3) [1915] 10 N. L. R. 188=27 I. C. 506.

(4) [1898] 20 All. 182=(1898) A. W. N. 19.

A. I. R. 1927 Nagpur 159

FINDLAY, J. C.

Bala and others—Defts.—Appellants.
v.

Girdhar and others—Plffts.—Respts.

Second Appeal No. 65-B of 1926, Decided on 8th December 1926.

(1) [1915] 39 Bom. 386=29 I. C. 229=42 I.A. 110 (P. C.)

(2) [1917] 13 N. L. R. 25=39 I. C. 54.

Limitation Act, Art. 120 — Applicability — Limitation Act, Art. 14.

Suit for declaration that defendants are not permanent tenants of a field and that the order of Revenue Officer to that effect be held as incorrect is governed by Art. 120 and not by Art. 14.

Before Art. 14 can apply, the order must needs be one which must under law be set aside: 19 C. W. N. 1303 and A. I. R. 1925 Cal. 518, *Rel. on*, [P 160 C 2]

S. A. Ghadgay and Atmaram Bhagwant —for Appellants.

B. R. Pendharkar and W. B. Pendharkar —for Respondents.

Judgment. — The plaintiffs-respondents, Girdhar, Umakant and Laxman, brought the present suit against the defendants-appellants, Bala, Gangaram, Vithu, Daji and Narain, in the Court of the Additional Subordinate Judge, Second Class, Kelapur, for a declaration that the Defendants Nos. 3 to 7 were not the permanent tenants of the field in suit and that the order of Mr. Vaidya, Sub-divisional Officer, dated 28—11—1923 (cf. Exhibit P. 3), was incorrect. Plaintiff 1 Girdhar is the managing proprietor of the village in question, whilst the other two plaintiffs and defendants Rajanna and Sohanna are other co-sharers of mouza Adegaon. The Judge of the first Court held that the plaintiffs' allegation that the field was leased for the first time in 1897-98 to four persons named was not established; that the field was held by Annapurna Bai in the years 1893-94, 1894-95 and 1895-96 and by Mahadeo and Ragho in 1897-98, and that the defendants not having been in possession since 1895 were not permanent tenants, their possession having originated after the year 1895-96. Decree was accordingly passed in favour of the plaintiffs.

Bala, Gangaram, Vithu, Daji and Narain appealed to the Court of the Additional District Judge, Yeotmal. The learned Additional District Judge held that after the 1st of June 1895, viz., in the year 1895-96, one Annapurna Bai was in possession of the field, and this finding necessarily implied that the defendants were not permanent tenants.

The first point urged on behalf of the appellants was that the present suit was barred under Art. 14, Sch. 1 of the Limitation Act, and that S. 77 of the Berar Alienated Villages Tenancy Law of 1921 did not apply to the case. The latter part of this proposition is obvious and was admitted on behalf of the respondent

No. 1. I do not, however, think that Art. 14 applies to the case. An incidental effect of the plaintiffs obtaining the declaration they want may be that Mr. Vaidya's order referred to above is nullified but before Art. 14 referred to can apply, the order referred must needs be one which must under law be set aside. This latter proposition cannot be postulated of the present case and the principle of the decisions in *Nabachan Badhai v. Raghunath Babu* (1) and *Sir Prodyat Kumar v. Bal Gobinda* (2) is, in my opinion, clearly applicable here. I am of opinion that Art. 120 of the First Schedule to the Limitation Act governs this case and thus the present suit is clearly within time.

It has next been urged on behalf of the appellants that the evidence justifies the presumption that their predecessor in title was in possession of, at any rate, part of the field in suit in 1895. If this were so, I should have expected to find mention of the fact in the lagwans for 1894-95 and 1895-96 (Exs. P-7 and P-8). Both the documentary and the oral evidence, however, justifies the finding that defendants' predecessor was not in possession in 1895-96. Mere assertion by witnesses, some of whom were obviously too young to have personal knowledge of the fact that defendants or their father had been in possession for 30 or 35 years, is of little or no value and it is peculiarly significant that Defendant 1, Bala, as D. W. 1, as well as others of the defendants' witnesses admitted that Annapurna Bai had previously held the field. All the weight of the evidence on record is against the idea that Annapurna Bai only held the field before 30 or 33 years ago. In any event there is a *prima facie* satisfactory and reasoned finding of fact arrived at by both the lower Courts on this point and that finding of fact cannot, in the circumstances, be questioned on second appeal.

These findings govern the appeal which is dismissed. Appellants must bear the respondents' costs. Costs in the lower Courts as already ordered.

D.D.

Appeal dismissed.

(1) [1915] 19 C.W.N. 1303=30 I.C. 61=21 C. L.J. 646.

(2) A.I.R. 1925 Cal. 518.

A. I. R. 1927 Nagpur

HALLIFAX, A. J. C. 161

Devaji—Defendant—Appellant.

v.

Govind and others—Plaintiffs—Respondents.

Second Appeal No. 469 of 1925, Decided on 11th November 1926, from the decree of the Dist. J., Wardha, D/- 25th July 1925, in Civil Appeal No. 31 of 1925.

C. P. Tenancy Act (1920), S. 13—Occupancy holding—Holding transferred to one co-sharer—Lambardar consenting—Suit to challenge lies only on ground of fraud—Ejectment proceedings can lie in Revenue Court under S. 13.

If an occupancy holding transferred to one of several co-sharers in the village is regarded as khudkasht, then it is admittedly transferred to the whole proprietary body. In that case if the separate holding of it as khudkasht has the consent of the lambardar, that is of the whole body of co-sharers, no member of that body can set aside that agreement except on the ground of fraud, or under S. 215 or S. 216 of the Contract Act or S. 90 of the Trusts Act if the lambardar has allotted the land to himself. In either case the whole proprietary body would have to sue, except of course the defendant. [P. 162, C. 1]

But a co-sharer who buys an occupancy holding does it for his own benefit, and he must surely be considered an outsider for the purposes of ejectment as well as in the transfer; he is simply the transferee of an occupancy holding, and can be ejected only on application to a Revenue Officer under S. 13 of the Tenancy Act, 1920, by the whole proprietary body; after ejectment he would of course go into possession as a co-sharer with the others, but he would be entitled to no contribution from them of a share in the cost of acquisition; *Remarks in 4 N. L. R. 120 held as obiter and not Foll.* [P. 162, C. 1]

K. K. Gandhe—for Appellant.*M. R. Bobde*—for Respondents.

Judgment.—The land in dispute, which was an occupancy holding till the beginning of the year 1919, is situated in the village of Talni. The plaintiffs, Govinda Teli and his two brothers, own a four-anna share in the village, but live at Vichora eleven or twelve miles away. The first defendant is their uncle Devaji Teli, who owns a four-anna share in Talni and lives there and is the lambardar of the village. The remaining eight-anna share belongs to Tatyaji Kunbi who also lives at Talni; he was the second defendant in the suit and a respondent in the lower appellate Court, but he remained absent throughout and has now dropped out of the case. His connexion with the matters in dispute is

not without importance but has been left out of sight.

On the 15th of April 1919 Devaji and Tatyaji jointly bought up the occupancy holding for Rs. 1,100. The deed executed in their favour was registered, and it contains the untrue statement that the sum paid was Rs. 2,000. The land was divided between the two defendants and each cultivated a half of it during the next three agricultural years, in each of which it was recorded as their separately held khudkasht. The plaintiffs were aware of the transfer within two months after it took place, but did nothing for three years. On the 2nd of August 1922 they filed the plaint in the present suit, claiming possession of a joint quarter share in the land. It was found that the Court in which they filed the plaint had no jurisdiction in the suit, and the plaint was returned to them on the 21st of April 1923 for proper presentation. They then waited nearly another year and presented the same plaint on the 22nd of February 1924 in the Court which eventually tried the suit.

Probably the correct view of the transfer is that registration of the document makes it a surrender to the lambardar that is to the whole proprietary body, and not a sale to the two co-sharers Devaji and Tatyaji, in spite of the inclusion of the latter as a transferee. But even if the transfer is really a sale to two co-sharers out of more, the position arising out of subsequent events is the same. After the transfer the whole proprietary body, including the plaintiffs, agreed that Devaji and Tatyaji should each cultivate half of the land, either as his separately held khudkasht or as his occupancy holding. This agreement was made through their Agent the lambardar who happened to be a member of the other party to it also, but that fact alone does not make it any less binding.

Under these circumstances it is impossible that any member of the proprietary body can set aside its own agreement, except on the ground of fraud. But the plaintiffs here have ratified the action of their Agent, not only by doing nothing for three years, but also by accepting at the end of each of those years, as they presumably did, the debit of some payment against each of the defendants in

respect of this land in the village accounts.

There is a further circumstance in this case that debars the plaintiffs from questioning the action of their agent. In the pleadings it was stated by Devaji that in a partition between him and them some years ago it was agreed that thereafter he was to take possession of all surrendered lands in Talni and they were to do the same at Vichora. This allegation was never denied or even mentioned by the plaintiffs, and was therefore admitted by them to be true.

With more than the respect merely due to the opinion of a Judge of this Court, I have always found difficulty in accepting the views expressed by Stanyon, A. J. C., in *Ramdayal v. Gulabia Bai* (1) as correct. If an occupancy holding transferred to one of several co-sharers in the village is regarded as khudkasht then it is admittedly transferred to the whole proprietary body. In that case if the separate holding of it as khudkasht has the consent of the lambardar, that is of the whole body of co-sharers, no member of that body can set aside that agreement except on the ground of fraud, or under S. 215 or S. 216 of the Contract Act or S. 90 of the Trusts Act if the lambardar has allotted the land to himself. In either case the whole proprietary body would have to sue, except of course the defendant.

But a co-sharer who buys an occupancy holding does it for his own benefit, and he must surely be considered an outsider for the purposes of ejection as well as in the transfer; he is simply the transferee of an occupancy holding, and can be ejected only on application to a Revenue Officer under S. 13 of the Tenancy Act, 1920 by the whole proprietary body; after ejection he would of course go into possession as a co-sharer with the others, but he would be entitled to no contribution from them of a share in the cost of acquisition.

The question of the correctness of the views expressed in *Ramdayal v. Gulabia Bai* (1) is of very great importance. The statement of them is to great extent obiter dicta as the suit was found to be barred by time. They are also based almost entirely on principles of equity to which we can have recourse only in

the absence of statutory provision of which there seems to be enough to govern both that case and this. I am therefore entitled to decline to accept them without referring the matter to a Bench. From that however I refrain out of my respect for the learned Judge who stated them, and because the decision in this case will be the same even if they are accepted, so that the opinion of the Bench would also be an obiter dictum.

Stanyon, A. J. C., laid it down that such a claim as this

is a claim in equity within the discretion of the Court to grant or refuse and must be advanced without unreasonable delay after acquisition of the holding.

The acceptance of the situation for three years, and for another year later, by the plaintiffs would clearly be enough of itself to make it inequitable to give them the relief they seek. But further their agreement with Devaji that he should take possession of all surrendered land in Talni bars their claim in law as well.

The decree of the lower appellate Court will accordingly be set aside and in its place a decree will issue dismissing the suit. The plaintiffs-respondents will pay the whole of the costs of both parties in all three Courts.

D.D.

Decree set aside.

A. I. R. 1927 Nagpur 162

KINKHEDE, A. J. C.

(Shrimant Kuar) Laxmanrao Bhonsley
—Defendant 1—Appellant.

v.

Narain and another—Plaintiffs—Respondents.

Second Appeal No. 154-B of 1924, Decided on 8th October 1926, from the decision of the Addl. Dist. J., Buldana, D/- 31st January 1924, in Civil Appeal No. 19 of 1923.

(a) Civil P. C., O. 22, R. 5—A legal representative in continuing a suit cannot set up a new right.

A legal representative must continue the litigation on the cause of action sued upon and he cannot set up or agitate a new right of suit or his own individual right. Although if the former suit was a representative suit he may get the benefit of the former decision on the abstract right of his family, e. g. to officiate as kamadar: A. I. R. 1925 P. C. 272 Rel. on.

[P. 163, C. 1]

(1) [1908] 4 N. L. R. 120.

(b) *Minor*—Minor can hold a position of confidence under special custom or reservation—Custom.

Although a minor is considered disqualified like females for holding a position of confidence yet a female or a minor heir may by virtue of a special custom or reservation of a right under the terms of a sanad be entitled to hold the office and nominate his deputy or substitute.

[P. 163, C. 1]

B. K. Bose and P. N. Rudra—for Appellant.

M. B. Niyogi—for Respondents.

Judgment.—I think that in view of the death of Krishna Rao, who was a co-appellant and co-plaintiff with Janki Bai, this case must go back for an investigation of the question of the surviving plaintiff Mt. Janki Bai's right to sue or continue the suit in her sole name. That question was not material so long as Krishna Rao was a co-plaintiff with her as he alone even could have maintained the suit. His death having taken place during the pendency of this appeal the question of Janki Bai's right has become material. No doubt the appellant has substituted one Narain a minor in place of Krishna Rao. But as a legal representative must continue the litigation on the cause of action sued upon and he cannot set up or agitate a new right of suit or his own individual right the decree may be necessarily enure for the benefit of Narain or support his individual right, although if the former suit was a representative suit he may on the analogy of the rule enunciated by their Lordships of the Privy Council in *Mata Prasad v. Nageshar Sahai* (1) get the benefit of the former decision on the abstract right of his family to officiate as kamadar of the appellant which may devolve on him as a member of that family under the terms of the sanad.

Then again Narain being a minor he would prima facie be considered disqualified like females for holding the office of a kamadar, which is necessarily a position of confidence and respectability, and ordinarily, none but an adult male could be considered fit to hold it. But it is just possible and there is room for assuming that the female heir or a minor heir may by virtue of a special custom or reservation of a right under the terms of the sanad be entitled to hold the office and nomi-

nate his deputy or substitute. It is therefore neat and proper that Mt. Janki Bai and the minor Narain should have an opportunity to prove that the office has rightly devolved on them or any of them and that the decree must therefore enure for their benefit also. In this view of the case, I do not see any necessity to consider the correctness or otherwise of the findings arrived at as regards the merits of the claim. The case is therefore remanded to the lower Court for enquiry and fresh decision with advertence to the above remarks and in accordance with law. The costs hitherto incurred including the costs of this appeal will abide the event.

J.V.

Case remanded.

A. I. R. 1927 Nagpur 163

FINDLAY, J. C.

Gulabchand—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revision Application No. 470 of 1926, Decided on 30th November 1926, from the judgment of the 1st Cl. Mag., Chhindwara, D/- 29th September 1926, in Criminal Appeal No. 22 of 1926.

Criminal P. C., S. 237—Charge under S. 147, I. P. C.—Conviction under S. 160, I. P. C., is not illegal.

A conviction under S. 160, I. P. C. (committing affray) is maintainable though the accused were charged only under S. 147, I. P. C. (rioting): *A. I. R. 1924 Mad. 375* and *8 Bom. L. R. 120, Dist.*; *A. I. R. 1921 All. 261, Appr.*

[P. 164, C. 1]

V. R. Dhoke—for Applicant

Order.—The applicant Gulabchand as well as his two co-accused, Bridhichand and Punamechand, whose applications are also disposed of in this order were convicted by the Magistrate, 2nd Class, Chhindwara, of an offence under S. 160, I. P. C., and each was sentenced to a fine of Rs. 60. The Magistrate, 1st class, Chhindwara, who heard the connected appeals, maintained the convictions and sentences.

The only question I am concerned with in these applications is whether the two lower Courts were correct in framing a charge under S. 147, I. P. C., while convicting the applicants under S. 160, I. P. C. I have been referred in this

(1) *A. I. R. 1925 P. C. 272=47 All. 883 (P. C.).*

connexion to the decision of Krishnan, J., in *Sreeramulu v. King-Emperor* (1) as being a direct authority for the proposition that has been advanced on behalf of the applicants viz., that the trial was illegal on the above ground. That case was entirely different, because therein there was clearly no evidence on record that the fight had taken place in the public place and that there was a disturbance of the peace. As regards the latter part of the said judgment, it does not seem to me that in the present case there is the slightest ground for supposing that the applicants were in any way prejudiced in their defence by the action of the Magistrate. The disturbance took place, as is shown by the 1st Class Magistrate, in his appellate judgment, in a public place and there was obviously a breach of the public peace. If S. 237 of the Criminal P. C. is to have any real meaning at all, the present occasion was obviously one for giving effect to it. In any event, with all deference to the learned Justice who decided the case quoted above, I should personally not have the slightest hesitation in preferring the view taken by Ryves, J., in *Sabir Husain v. Emperor* (2). S. 237 of the Criminal P. C. must necessarily be limited in its operation to cognate offences. In the present instance, the only alleged new element concerns the breach of the public peace, but this element was obviously present before the minds of the Court and the accused all through the case. The decision of Jenkins, C. J., and Betty, J., in *Emperor v. Sakharan Ganu* (3) is not in the slightest degree to the point. There the relative offences concerned were ones under Ss. 376 and 366, I. P. C. As regards each of these offences, different elements entered into them and different questions of fact were concerned, whereas precisely the reverse is true of the present case and the offences under Ss. 147 and 160 respectively were obviously ejusdem generis. This being so, there was, in my opinion, no impropriety whatever in convicting the applicant under S. 160 of I. P. C.

The application is accordingly dismissed without notice to the Crown.

D.D. Application dismissed.

(1) A. I. R. 1924 Mad. 375=47 Mad. 61.

(2) A. I. R. 1921 All. 261.

(3) [1906] 8 Bom. L. R. 120.

A. I. R. 1927 Nagpur 164

FINDLAY, J. C.

Rajaram—Defendant—Appellant.

v.

Mukund Rao—Plaintiff—Respondent.

Second Appeal No. 519 of 1925, Decided on 23rd November 1926, from the decree of the Dist. J., Nagpur, D/- 21st August 1925, in Civil Appeal No. 77 of 1925.

(a) *Civil P. C., S. 115 — Small Cause suit tried on regular side — High Court would not interfere.*

Where a suit of Small Cause nature was tried on the ordinary side, the High Court refused to interfere in revision: *A. I. R. 1924 Nag. 17, Foll.* [P 165 C 1]

(b) *Civil P. C., Ss. 115 and 100—Interference on the question of jurisdiction is discretionary.*

On the question of jurisdiction whether under S. 115 or S. 100 of the Code, a discretion rests with the High Court whether it is in the interests of justice to interfere. [P 165 C 1]

D. T. Mangalmoorti—for Appellant.

W. R. Puranik—for Respondent.

Judgment.—The facts of this case are sufficiently clear from the two judgments of the lower Courts. On the appeal coming on for hearing, the only ground, which was pressed, was the tenth and last one. It is perfectly obvious that the other grounds stood no chance of success, as the findings of fact of the learned District Judge were arrived at after a careful and thorough investigation of all the evidence. It is urged, however, that the Subordinate Judge of the 2nd Class had no jurisdiction to try the suit on the ordinary side in view of the provision of S. 16 of the Provincial Small Cause Courts Act, and in this connexion reliance has been placed on *Ramasamy Chettiar v. R. G. Orr*. (1). White, C. J., in the said case held that, as the lower Court had exercised a jurisdiction not vested in it by law, he was bound to interfere and exercise his revisional jurisdiction. It is pertinent, however, to point out that a Bench of the same High Court in *Parameshwaran Nambudiri v. Vishnu Embrandri* (2), expressly dissented from the earlier decision. Ayyar, O. C. J., and Benson, J., therein pointed out that the provision of the Provincial Small Cause Courts Act referred to must be read along with

(1) [1903] 26 Mad. 176=12 M. L. J. 264.

(2) [1904] 27 Mad. 478.

the corresponding provision for revision, as the case may be, in Civil Procedure Code. This question was considered at length in an exactly analogous case by Baker, O. J. C. cf. *Kamruddin v. Mt. Indrani* (3). It has however been suggested by counsel on behalf of the appellant that that decision overlooked the peremptory nature of S. 16 of the Provincial Small Cause Courts Act. I cannot concur, however, in this contention of the appellant. The judgment in *Kamruddin v. Mt. Indrani* (3) contains an exhaustive examination of many other decisions bearing on the point, and in these cases there was clearly no misapprehension as to the meaning of S. 16, Provincial Small Cause Courts Act.

For my own part, the objection to jurisdiction having been raised for the first time in this Court, it seems to me that the parties must be held to have consented to the case being tried originally in the Court in which it was. The equities of the case clearly do not, in my opinion, demand interference by this Court solely on the question of jurisdiction, and whether under S. 115 or S. 100 of the Civil Procedure Code it seems to me that a discretion rests with this Court whether it is in the interests of justice to interfere. In the present case it cannot be seriously contended that the interests of the parties have not been more thoroughly safeguarded by the trial of this case in the ordinary Court rather than in the Small Cause one, and I, therefore, decline to interfere.

The appeal is accordingly dismissed. The appellant must bear the respondent's costs. Costs in the lower Courts as already ordered.

D.D. *Appeal dismissed.*

(3) A. I. R. 1924 Nag. 17=19 N. L. R. 179.

A. I. R. 1927 Nagpur 165

PRIDEAUX, A. J. C.

Vithu Mhali—Defendant—Applicant.

v.

Vithu Mahadji—Plaintiff—Non-Applicant.

Civil Revision No. 145-B of 1925, Decided on 23rd November 1926, from the order of the Small Cause Court J., Akola, D/- 27th July 1925, in Execution Case No. 2 of 1925.

Provincial Small Cause Courts Act, S. 17 (1)—Provisions are directory—Court can extend time for deposit of security—Limitation Act, S. 5.

The proviso as to a deposit or security being made at the time of presenting an application is merely directory and not mandatory and Court has power to extend the time: *A. I. R. 1923 Mad. 354*; *A. I. R. 1926 All. 602, Rel. on*; *43 Mad. 579, not Foll.* [P 166 C 1]

A. V. Khare and W. B. Pendharkar—for Applicant.

G. G. Hatvalne—for Non-Applicant.

Order.—In Small Cause Suit No. 2185 of 1924, on the file of the Court of Small Causes, Akola, an ex-parte decree was passed against the present applicant-defendant on 25—11—24. On 18—12—24 he applied for setting aside that decree, and with his application gave a surety bond of one Pandhari Vithu. The Clerk of Court made an endorsement that the record should be put up before the Court on 3—1—25, and on that date security was accepted by Mr. Ghosh, the then Judge, as sufficient. Mr. Telang succeeded him, and on the 27th July rejected the application on the ground that the proviso to S. 17 of the Provincial Small Cause Courts Act as to a deposit of security being made at the time of presenting the application is mandatory and not directory; and as the security was accepted after the period of limitation, he rejected the application. The question before me is whether the proviso to the section mentioned above is directory or mandatory, and whether the time for making a deposit or giving security is extendable at the Court's discretion.

The question is not free from difficulty. In *Azmat-ullah Khan v. Ahmad Ali* (1) a very similar case the Court held that the judgment-debtor had substantially complied with the requirements of S. 17; and in *Loipillai Samban v. Sappanimuthu Samban* (2) it was decided that even if there was a delay in depositing the amount the Court had power to extend the time under S. 5 of the Limitation Act. A similar view was taken in *Sudalaimuthu Kudumban v. Andi Reddiar* (3). In a case, somewhat similar to the present, *Ganga Dhar Baij Nath v. B. B. & C. I. Railway* (*A. I. R. 1926 All. 602*), the Court held in favour of the person presenting the application to set aside an ex-parte decree. In *Assan*

(1) *A. I. R. 1925 All. 379=47 All. 728.*

(2) *A. I. R. 1923 Mad. 354.*

(3) *A. I. R. 1922 Mad. 186=45 Mad. 628.*

Mohamed Sahib v. Rahim Sahib (4) their Lordships of the Madras High Court held that the provisions of S. 17 (1) are mandatory. I am aware of the decision of Ismay, J. C., in *Umrao Jiwan Patel v. Munnumian Musalman* (5); but the question of application of S. 5 of the Limitation Act was not discussed in that case. I am inclined to the view that the proviso as to a deposit or security being made at the time of presenting an application is merely directory and not mandatory; and if, as in the present case, security is given at the time of presenting the application for setting aside the decree, the requirements of the proviso are satisfied. I would not hesitate to apply the provisions of S. 5 of the Limitation Act to the present case, and I do so.

I therefore set aside the order, rejecting the application. But the question of the sufficiency of the security given must be decided afresh. For it is alleged here that the security bond was signed by the son of the judgment-debtor who was a minor at the time. The Court will now proceed to determine whether the bond was sufficient security. If it finds in the affirmative, it will, if reasons exist for setting aside the ex-parte decree, set it aside. If, on the other hand, it finds that the security bond is not sufficient and the giving of it is a fraud on the Court it will reject the application for setting aside the ex-parte decree.

With these remarks I send the case back to the lower Court. The parties in this Court will bear their own costs. I fix pleader's fees at Rs. 15.

G.B. *Case remanded.*

(4) [1920] 43 Mad. 579=38 M.L.J. 539=55 I. C. 977=11 L.W. 543.

(5) [1906] 2 N.L.R. 23.

A. I. R. 1927 Nagpur 166

KINKHEDE, A. J. C.

Narayan—Appellant.

v.

Nathu and others—Respondents.

Second Appeal No. 146-B of 1924, Decided on 23rd December 1926, from the decision of the Dist. J., Amraoti, D/- 4th March 1924, in Civil Appeal No. 37 of 1923.

(a) *Provincial Insolvency Act* (1920), S. 53—*Mere passing of valuable consideration or mere transference of possession to transferee does not lead to infer good faith—Intention to transfer ownership must be proved.*

The mere fact that valuable consideration has been paid for the transfer does not necessarily lead to an inference of good faith also: *A. I. R. 1921 Nag. 103, Foll.* In order to prove good faith it is necessary for the purchaser to show that there was real intention of the debtor to pass ownership, and of himself to acquire it. Mere transference of possession is insufficient to give rise to any inference which would support an intention to acquire ownership. [P. 167, C. 1; P. 168, C. 1]

(b) *Provincial Insolvency Act*, S. 53—*Facts dealing with bona fides must be considered as a whole.*

Each fact dealing with the bona fides of the transactions is not to be separated from the rest of the facts, but the facts should be considered in relation to each other and weighed as a whole: 15 N. L. R. 68, *Foll.* [P. 167, C. 2]

(c) *Civil P. C.*, S. 100—*Legal effect of proved facts is question of law—High Court can interfere.*

Questions of law and facts sometimes are very difficult to disentangle but as the proper legal effect of proved facts is essentially a question of law, the High Court in Second Appeal is justified in interfering with them especially where the decision of the lower appellate Court reverses the judgment of the lower Court and does not show marks of having come into close quarters with it and met the reasoning therein: 16 M. L. J. 272 (P. C.), *Foll.* [P. 168, C. 1]

W. B. Pendharkar—for Appellant.

S. A. Ghadgay—for Respondents.

Judgment.—This is an appeal preferred against the order of the District Judge, Amraoti, setting aside the order, passed by the Subordinate Judge, annulling the sale dated 25-5-22, under S. 53 of the Provincial Insolvency Act, 1920, for Rs. 7,000 in favour of respondent Nathu. The consideration of this sale consists of Rs. 5,200 payable to mortgagees who were relations of the debtor Ganpat in satisfaction of a mortgage dated 20-3-1922, Rs. 600 received as earnest money and Rs. 1,200 paid before the Sub-Registrar. The sale relates to two fields belonging to the debtor. This transfer to Nathu is one of the three acts of insolvency on which the present appellant Narayan's application, dated 20-6-22, to get his debtor Ganpat adjudged insolvent was founded. The other two transfers were the aforesaid mortgage dated 20-3-22 and the sale dated 16-6-22 for Rs. 795 in respect of a house to one Punjaji. The sale in favour of Punjaji was annulled by the

Subordinate Judge but upheld by the lower appellate Court. Against the District Judge's order upholding the said sale, Second Appeal No. 147-B of 1924 has been filed. This judgment will govern both these appeals.

It is contended before me and I think very rightly, that the District Judge has misdirected himself upon a point of law in dealing with the facts involved in those two cases and that sufficient attention was not directed to the question as to how far the burden of proof which under the ruling of this Court in *Gopal v. Ramkrishna* (1) lay on the alienees was discharged by them. It was pointed by this Court in the aforesaid case that the mere fact that valuable consideration has been paid for the transfer does not necessarily lead to an inference of good faith also. Admittedly in the case of transfer to Nathu Rs. 5,200 were left with him. Rs. 600 were said to have been paid by way of earnest money and Rs. 1,200 are described to have been paid before the Sub-Registrar. Even assuming these recitals to be correct the whole of the consideration lay as between the vendor and the vendee in their own hands. The vendor has also bolted away and is now earning his livelihood by labour. It is thus clear from facts found that he planned a flight from his creditors with the sale proceeds of the transfer being partly in his hands and partly left in the hands of the vendee. Indeed the sole object of his transfer presumably must have been to convert his property into cash and shuffle out of sight his money and himself. This coupled with the circumstances that the transferee Nathu is a relation of the debtor ought to have sufficed for imputing to him notice of the transferrer's evil design. His good faith was thus on trial in the case in which his transfer is in question. If he acted innocently his transaction holds good only if he has paid good and sufficient consideration for it. Mere proof of payment of consideration has for this reason been considered insufficient to lead to an inference of good faith.

The very circumstances to which the lower Courts have adverted, negative good faith on the purchaser's part. The property transferred is substantially the whole of the insolvent's estate; that

there was no hurry and need to arrange for payment of satisfaction of the mortgage dated 20-3-22 and still the purchaser Nathu undertook to carry out the direction to pay Rs. 5,200 to the mortgagees. His admission that he made no enquiries as to who the creditors other than the mortgagees were, was also a circumstance which clearly showed want of bona fides on his part. The lower appellate Court seems to have attached much importance to the fact that the vendee held possession of the fields. In the circumstances of the case this circumstance rather showed the absence of bona fides as this was just what we would expect when the debtor has arranged for his flight from his creditors. The cumulative effect of all these facts does not seem to have been considered by the lower appellate Court as laid down by their Lordships of the Privy Council in *Seth Ghunsham Das v. Umapershad* (2). Each fact dealing with the bona fides of the transactions is not to be separated from the rest of the facts, but the facts should be considered in relation to each other and weighed as a whole.

I have read the orders of the District Judge in both the cases and I do not find any appreciation of the evidence on the lines laid down by their Lordships of the Privy Council. Their Lordships of the Privy Council have pointed out in *Musahar Sahu v. Hakim Lal* (3) that a case in which no consideration of the law of bankruptcy applies there is nothing to prevent a debtor paying one creditor in full and leaving others unpaid although the result may be that the rest of his assets will be insufficient to provide for the payment of the rest of his debts. It therefore follows that in cases where questions of bankruptcy are involved, preference by debtor to one creditor, retention of benefit to himself, his absconding away with the sale-proceeds, and arranging for the management or cultivation of his property through the apparent vendees, without any arrangement to apply the sale proceeds towards the liquidation of the debts due to the general body of creditors, necessarily give rise to the only legal inference that the debtor resorted to the

(2) [1919] 15 N. L. R. 68=50 I. C. 264=21 Bom. L. R. 472 (P. C.).

(3) [1916] 43 Cal. 521=32 I. C. 343=43 I. A. 104 (P. C.).

(1) A. I. R. 1921 Nag. 103=17 N. L. R. 69.

A. I. R. 1927 Nagpur 168

HALLIFAX, A. J. C.

Bajirao—Appellant.

Y.

Shivaram and others—Respondents.

First Appeal No. 34 B of 1926, Decided on 20th December 1926, from the decree of the Sub-J., 1st Cl., Morsi, D/- 23rd March 1926, in Civil Suit No. 150 of 1924.

(a) *Transfer of Property Act, S. 54—Consideration made payable before Sub-Registrar—Seller must seek out purchaser.*

Where the agreement to sell immovable property makes the money payable "before the Sub-Registrar" it is the duty of the seller to seek out the purchaser with a proper sale-deed. [P 169 C 1]

(b) *Contract Act, Ss. 64 and 65—Seller rescinding contract under S. 64 or purchaser rescinding contract under S. 65—Seller must refund earnest money—But seller rescinding under S. 65 is entitled, if there is usual forfeiture clause, to compensation not exceeding earnest money under either Contract Act S. 73 or S. 74.*

When a contract to sell is rescinded the seller must restore the benefits he has received under it under S. 64 if he rescinds it himself and under S. 65 if the purchaser rescinds it, that is to say, he must refund the earnest money. But when he rescinds it himself, if he has suffered any actual damage he is entitled to get compensation for it under S. 73 and even if he has suffered none he can be awarded a reasonable amount as compensation not exceeding the earnest money, if there is the usual agreement of forfeiture in the contract, under S. 74. Either sum awarded as damages can be set off against the amount of earnest money he has to refund. [P.169 C 2]

G. L. Subhedar—for Appellant.

R. R. Jayavant and V. N. Herlekar—for Respondents.

Judgment.—On the 30th of July 1922, the first three defendants agreed to sell a field and a half share in another to the plaintiff appellant by the 31st of January 1923 for Rs. 5,555, which were to be paid by the cancellation of a decree held by the plaintiff by which these defendants had to pay him Rs. 1935 and the cancellation of a debt of Rs. 120 due by them as rent of a field and by the payment of Rs. 2,500 in cash. The sum of Rs. 2,055 due on the decree and for rent was treated as paid and called "earnest money," which the plaintiff agreed to forfeit if he failed to carry out the contract. The sale deed was never executed and on the 25th of April 1923, these defendants sold one of the fields,

transfers in collusion with the transferees with the common intention of defeating and delaying his creditors. In short the only legal inference deducible from such facts could, in the peculiar circumstances of this case, be that there was a common intention on the part of the vendor and the vendee to act *mala fide* in the matter of shielding the property. In order to prove good faith it was therefore necessary for the purchaser to show that there was real intention of the debtor to pass ownership, and of himself to acquire it. Mere transference of possession was insufficient to give rise to any inference which would support an intention to acquire ownership. The burden of proof could not therefore be said to have been duly discharged by the purchaser under each of the two sales.

As regards Punjaji the circumstance that he had a house of his own which it is said he has kept locked because he has purchased the one belonging to Ganpat, was a very strong circumstance which casts suspicion upon his bona fides. I am not therefore prepared to support the orders appealed against. No doubt questions of law and facts sometimes are very difficult to disentangle, but as the proper legal effect of proved facts is essentially a question of law, I feel justified in interfering with them, especially as the decision of the lower appellate Court, which reverses the judgment of the lower Court which in each case, does not show marks of having come into close quarters with it and met the reasoning therein, as pointed out by their Lordships of the Privy Council in *Hemanta Kumari Debi v. Jagadindra Nath* (4). I therefore allow the appeals and reversing the decisions of the lower appellate Court, direct that the orders of the insolvency Court be restored. The respondents will pay the costs of the appeal, as also those of the Courts below, in each case. Pleaders's fee Rs. 100.

R.D.

Appeals allowed.

(4) [1906] 16 M. L. J. 272=10 C. W. N. 630=3 A. L. J. 363=8 Bom. L. R. 400 (P.C.).

that of which they owned the whole, to the fourth defendant. On the 3rd of November 1924 the plaintiff filed the suit, out of which this appeal arises, for specific performance of the contract of July 1922, claiming in the alternative a sum of Rs. 5,000 as damages.

It was found in the lower Court that the plaintiff broke the contract. Even if that is a fact, a matter which has to be decided now, the basis of the finding is undoubtedly wrong. It is, that the plaintiff has failed to prove that he went to the defendants during January 1923, taking Rs. 3,500 with him and offered that sum to them. The agreement to sell makes the money payable "before the Sub-Registrar" not before the execution of the sale-deed. Also it was the duty of the sellers to seek out the purchaser with a proper sale-deed.

I am satisfied on the evidence that the plaintiff did go to the defendants twice during that last month of the period fixed in the contract to call on them to carry it out, and also that he was able and willing to pay them the Rs. 3,500 on the execution of the sale-deed though he was not bound to do so till it was registered. One of the strongest pieces of evidence on the point is Exhibit P. 4, a lawyer's letter of the 20th of February 1923 sent by these defendants in reply to a similar letter of the 9th of the same month sent to them by the plaintiff. The plaintiff's letter is not produced, and the defendants' is to the following effect :

The statement in your letter that you came with the money twice in January is untrue; we were willing to carry out the contract, but you did not get a sale-deed executed, saying you had no money.

The necessary inference from this seems obvious.

But the defendants have made no attempt to support the allegation in that letter that the plaintiff expressly refused to carry out the contract; they deny it and say he never said anything about it till nine days after the end of January. Even if that is true, it is still they who broke the contract; it was their business to offer him a proper conveyance and call on him to pay the balance of the purchase money, which they admittedly never did.

In respect of the fourth defendant it has been held that there is no proof that he had notice of the contract to sell to

the plaintiff. There is certainly no evidence of its having been brought to his notice, and he denied that he had any knowledge of it. There seems a good deal of reason for believing that denial to be false, but it is among the artificia-lities of the administration of justice that it has to be accepted as true. It is on this ground that the plaintiff has in this Court withdrawn his prayer for specific performance of the contract. He has further reduced his claim for Rs. 5,000 as damages to a prayer for what is called a "refund of his earnest-money", admitting eventually that if he broke the contract he would not be entitled to get the whole of it back.

The matter is perfectly simple and was explained in *Lachmi Narayan v. Damodardas* (1). It is almost always obscured, as was done in this case, by supposing there is some special law in respect of earnest-money. The term is not used in the law of India, as far as I know and it is certainly not defined, but practically every case in which any question of earnest-money arises can be decided on the clear provisions of S. 64 or 65 and S. 73 or 74 of the Contract Act. When a contract to sell is rescinded the seller must restore the benefits he has received under it under S. 64 if he rescinds it himself and under S. 65 if the purchaser rescinds it, that is to say, he must refund the earnest-money. But when he rescinds it himself, if he has suffered any actual damage he is entitled to get compensation for it under S. 73, and even if he has suffered none he can be awarded a reasonable amount as compensation not exceeding the earnest-money, if there is the usual agreement of forfeiture in the contract, under S. 74. Either sum awarded as damages can be set off against the amount of earnest-money he has to refund.

The question of the payment of damages to the seller can of course only arise if the purchaser is responsible for the breach of the contract, and here it has been found that the sellers broke it. The benefit they received under the contract they broke was the cancellation of the liability to pay to the plaintiff Rs. 2,055, with interest after the 30th of July 1922, and this must be restored. The plaintiff has in this Court asked for

(1) A. I. R. 1925 Nag. 109=20 N. L. R. 192.

interest at the very moderate rate of 6 per cent. per annum.

The decree of the lower Court will be set aside, and in its place a decree will issue ordering the first three defendants to pay to the plaintiff the sum of Rs. 2,055 and compound interest thereon at 6 per cent. per annum, from the 30th of July 1922, till the date of payment, and also all the costs incurred by him in both Courts.

On behalf of the fourth defendant Ramchandra, the purchaser from the other defendants, it is urged that the plaintiff ought to pay his costs in both Courts. He is a resident of the village in which the land is situated and the other defendants live, and if he did not know of the agreement to sell to the plaintiff as he says, he laid himself open to trouble by his own carelessness. Further, he delayed the progress of the suit for a year by obvious evasions of summons, failing to appear when summons was served on him, and then appearing and getting the ex parte order against him set aside. There seems as little justification for setting it aside as for allowing the other defendants, before it was set aside, to take the plea that he was a purchaser in good faith without notice of the prior contract. The defendant Ramchandra will pay his own costs throughout.

R.D.

Decree set aside.

* A. I. R 1927 Nagpur 170

KINKHEDE, A. J. C.

Sherkhan—Complainant—Applicant.

v.

Anwarkhan—Accused—Non-applicant.

Criminal Revision No. 32-B of 1924, Decided on 30th August 1924, against the decision of the S. J., Akola, D/- 24th October 1923.

* (a) *Criminal P. C., S. 439—Acquittal—Revision at the instance of private prosecutor is not competent.*

Although High Court has jurisdiction under S. 439 to set aside the order of acquittal, it has become a settled practice that it will not ordinarily interfere, in revision at the instance of a private prosecutor; 27 All. 359; A.I.R. 1922 All. 487; A. I. R. 1921 All. 76, Rel. on. [P 173 C 1]

* (b) *Criminal P.C., S. 439—High Court will not go into evidence—Interference with acquittal will be only when trial was illegal or incurably*

irregular—Remand will be ordered only to when trial has been incurably irregular.

High Court will not go into evidence as a rule in revision; it will ordinarily confine its interference to cases of exceptional circumstances, or where there is error of law, nor will it interfere with the acquittal unless the trial has been illegal or so radically and incurably irregular as in fact to have occasioned a failure of justice. A retrial should only be ordered in cases of acquittal in which the Court has been radically and incurably defective. [P 174 C 2, P 175 C 1]

(c) *Criminal P. C., S. 417—Appeal against acquittal—Private individual cannot appeal.*

Power to appeal against acquittal is a power vested in the Local Government, and that no right to appeal is possessed by a private person. [P 173 C 2]

M. R. Bobde—for Applicant.

B. K. Bose and P. N. Rudra—for Non-applicant.

P. Lobo—for the Crown.

Order.—The facts which have given rise to this Criminal Revision are briefly these.

The non-applicant Anwarkhan instituted a suit in the Court of Small Causes at Akola by filing a verified plaint dated 1-7-1921 against the applicant Sherkhan for the recovery of a certain amount of money said to be due by the latter to the former in respect of a transaction dated 1-4-1918, which however the plaintiff chose to describe in his plaint as being one dated 1-7-1918. In the course of the same suit on 25-10-1921 he made an oral statement affirming the correctness of the date 1-7-1918 and characterised the date 1-4-1918 given in his books of account as written through mistake. At the adjourned hearing of the case 13-12-1921 the plaintiff in a penitent mood applied as per his application (Exhibit P-9), for permission to withdraw the suit, and the same was dismissed as withdrawn on that day. The defendant Sherkhan applied for sanction to prosecute the non-applicant for perjury in respect of the contents of the verified plaint dated 1-7-1921 (Exhibit P-2) and also of the oral statement made on affirmation dated 25-10-1921 (Exhibit P-20), so far as they falsely stated that the date of the transaction sued upon was 1-7-1918 and not 1-4-1918. The Judge of the Small Causes Court who had tried the case refused to grant sanction but the District Judge thought that this was a fit case for ordering prosecution for perjury, and granted it. The order of the District Judge dated 15-12-1922 was confirmed in due course by this Court.

A prosecution was accordingly started by Sher Khan by filing a complaint on 16-1-1923. He was examined by the Magistrate on 18-1-1923; after a protracted trial the trial Magistrate convicted the non-applicant for the offences of perjury under S. 193, Indian Penal Code, and sentenced him to two concurrent terms of six months rigorous imprisonment and imposed a fine of Rs. 500 for the false verification of the plaint. This judgment which is dated 4-8-1923 was appealed against by the accused Anwarkhan and the Sessions Judge, Akola, has reversed it in his judgment dated 24-10-1923. The convictions and sentences were thus set aside and the accused acquitted. For facility of reference it may be useful to summarise here the findings given by the Sessions Judge on the points formulated by him as material for the prosecution to establish in order to sustain a conviction under S. 193, Indian Penal Code.

As regards the first two points which dealt with the question whether the accused made the statement dated 25-10-1921 (Exhibit P-20), and also the declaration in the plaint (Exhibit P-2) concerning the date 1-7-1918, and whether such statement and declaration were made in a stage of judicial proceeding, the Sessions Judge held that they were so made. On the third point whether the statement and the declaration were false, he agreed with the trial Magistrate in concluding that the statement and declaration in question were false and incorrect. On the fourth point whether, when the aforesaid statement and declaration were made, the accused knew them to be false, or believed them to be false, or did not believe them to be true, and made them intentionally, the learned Sessions Judge came to the conclusion that the first declaration in the verified plaint was not shown to have been made with the knowledge that the same was false, or was believed to be false, or * * * was not believed to be true, or was made intentionally. He also found that the verification of the plaint (Exhibit P-2) was not in strict accordance with the requirements of law in that behalf, and the accused could not be said to have declared the contents so far as they gave 1-7-1918 as the date of the transaction sued upon, as true according to his personal knowledge. With

regard to the statement dated 25-10-1921 (Exhibit P-20) it was observed that it was made after filing of the notices by Sher Khan in the Court of Small Causes, and that the said notices which contained the appellant's admission that the transaction was dated 1-4-1918 were conclusive proof of the fact that the date of the transaction was 1-4-1918, but that the accused in all probability did not realize, just then, the importance of admitting the correctness of the date given by the defendant, and withdrawing the suit at once that very day. But the fact that he stuck to the statement in regard to the date lends support to the conclusion that he still continued to believe in the correctness of the date 1st July 1918 given in the rough memorandum (kacha Tipan Ex P-14). The Judge also thought that this belief may be due to dull understanding and want of keen perception on the part of the accused, or may be due to recklessness on his part, but that did not necessarily import lack of bona fides. It was found that the mere facts that the appellant made the statement dated 25th October 1921 could be no proof per se of his mala fides and his knowledge of, or belief in, the falsity of the statement. Lastly, he concluded that as mere suspicion of the bona fides of the accused was no legal or affirmative proof of lack of good faith and of the requisite knowledge or belief which are necessary to justify the inference of guilt, and as the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt, and as they did not stand this test in the present case, and there was doubt as to the guilt of the accused, and as, the doubt was not unreasonable in the circumstances of the case, the accused was entitled to the benefit of doubt and ultimately acquitted him of the two offences under S. 193, Indian Penal Code.

In arriving at these findings the Sessions Judge has taken great pains in keeping before his mind's eye the requirement of the law as to the kind of proof necessary to prove the guilt of the accused in a charge of perjury, and has given due weight to the various subtle and nice distinctions relied on in the course of the arguments by the counsel who argued the case, either, on the side,

of the accused, or of the Crown, or of the complainant Sher Khan. Mr. Cama, Public Prosecutor, who appeared for the Crown, appears to have very hotly contested the appeal before the Sessions Judge. It was after duly considering the various aspects of the case, that the explanation given by the accused was accepted by the Sessions Judge and the possibility of the inaccuracy of date given by the aforesaid declaration and statement being capable of being explained away has, it appears, led him to give the benefit of doubt to the accused.

It will be seen that it is against this acquittal dated 24th October 1923 that the complainant, after the lapse of nearly three and half months, lodged this petition for revision on 7th February 1924, without due regard to the practice which is declared to be the practice of this Court in *Bindaprasad v. Ripusudan* (1) by Stanyon, A. J. C., and in *Rani Sundrabai v. Kishore Singh* (Criminal Revision No. 264 of 1918) by Drake-Brockman, J. C., of not ordinarily interfering in revision, at the instance of a private prosecutor, with an acquittal after trial by a competent tribunal. Six grounds which deal entirely with the merits of the case and seek to challenge only the appreciation of evidence by the lower Court have been urged in the petition for revision. Nothing is however urged in the petition by way of any special reasons why it should be entertained at the instance of a private prosecutor, nor is there anything to indicate that the applicant was compelled to file it because the Local Government though moved by him to lodge an appeal against the acquittal had declined to take any action. Nor is there any assertion that interference in revision with this acquittal is urgently demanded in the interests of public justice, even at the instance of a private prosecutor.

The applicant's pleader was heard on 10th March 1924 and a rule nisi was ordered to issue calling upon "the non-applicant to appear and show cause why the conviction should not be restored" and the case was fixed for hearing for 11th April 1924. In response to a notice which is usually sent in such cases to the Standing Counsel, the Government Pleader appeared at the hearing dated

11th April 1924. It is significant to note that the six months period of limitation prescribed for the Local Government to file an appeal against an acquittal was still to expire, and in spite of this, the Government Pleader does not appear to have been instructed to lodge the appeal. I mention this circumstance prominently here, because the accused in showing cause against the petition has made much of it in the argument addressed at the Bar.

The accused not being served for the hearings dated 11th April 1924, 2nd May 1924, 30th June 1924 and it being represented that he was avoiding service, he was directed to be arrested and produced before this Court on 18th August 1924 to which date the hearing of the case was adjourned. He, however, voluntarily appeared on 8th July 1924 and executed a bail bond undertaking to appear at the hearing.

The case has been very ably argued on both sides and also on the side of the Government by the Government Pleader. A preliminary objection is raised on behalf of the accused to the maintainability of this revision petition against an acquittal at the instance of a private prosecutor. The Government Pleader also supports this preliminary objection. The accused contends that this Court cannot and should not entertain this revision in the absence of an appeal against the acquittal, the right to prefer which vested solely in the Local Government. It is pointed out that the provisions of S. 439 sub-Ss. (4) and (5) of the Criminal P. C., debar this Court from converting the finding of acquittal into one of conviction and also entertaining revision petition in a case where, though an appeal was allowed, has not been filed. The Government Pleader, on being questioned by me as to why the appeal allowed by law was not filed by the local Government, frankly admits there were no instructions to him to file it. The pleader for the applicant admits that his client did not move the Local Government to file an appeal against the acquittal. It is not, nor can it be therefore his case that the Local Government having been moved by him and having declined to appeal against the acquittal he was compelled to file this revision in the interest of justice. But it is argued on behalf of the appli-

(1) [1909] 5 N. L. R. 4=1 I. C. 233=9 Cr. L. J. 211.

cant that the decision of the Sessions Judge is wrong even on the merits, so that this Court might with propriety as well exercise its revisional jurisdiction, even at his instance, as if, an appeal was preferred by the local Government. With regard to the question of this Court converting the finding of acquittal into one of conviction, it is suggested that the difficulty could be got over by remanding the case for trial and fresh decision by the lower Court. A number of rulings have been relied upon by the accused in support of his objection and the Government Pleader has brought to my notice the case of *Bindaprasad v. Ripusudan* (1) while the applicant's pleader places great reliance on the decision of Drake-Brckman, J. C., in *Rani Sundrabai v. Kishore Singh* referred to above in support of his contention. The Government Pleader concedes in all fairness that the judgment may be open to the objection of want of proper appreciation of evidence.

I have considered the decisions reported in the several cases cited before me and I am of opinion that every one of them is an authority for the view that although the High Court has jurisdiction under S. 439 of the Criminal P. C., to set aside the order of acquittal, it has become a settled practice that it will not ordinarily interfere, in revision in such cases, at the instance of a private prosecutor. I need not cite cases under the old Criminal P. C. I would therefore confine my attention to cases under the Code of Criminal Procedure of 1898. In *Qayyumali v. Faizali* (2), the Allahabad High Court declined to interfere with an acquittal of an offence under S. 323, Indian Penal Code, at the instance of a private prosecutor. In *Emperor v. Sheodharshan Singh* (3), Gokul Prasad and Stuart, JJ., held that the High Court had no power except through the medium of appeal on behalf of the Local Government to convert the acquittal into a conviction. In the case before them the accused Sheodharshan Singh was committed to the Court of the Sessions Judge on a charge under S. 302, Indian Penal Code, the Sessions Judge found on the facts that an offence under S. 302 *ibid* was not made out but that an offence under S. 304, Indian Penal Code was

made out. He accordingly acquitted him of the offence of culpable homicide not amounting to murder. On a perusal of the sessions statement notice was sent by the High Court to the accused to show cause why he should not be convicted of the murder and punished accordingly. Although the Judges were fully convinced that the acquittal was wrong, they declined to interfere with it, in revision proceedings which they had started of their own accord in exercise of the powers of general superintendence which vest in every High Court, even when the charge of murder from which the accused escaped was one which undoubtedly would have justified their interference in the interest of the public justice. In *Pahalwan Singh v. Sahib Singh* (4), Stuart, J., declined to interfere in revision with an acquittal at the instance of a private prosecutor. The order in that case was passed by an appellate Court as in the present case. He observed :

It has been laid down in this and other Courts that this power of interference with acquittal in revision is a power that should be used very sparingly....One of the elementary principles of English Law is that once a man is acquitted he cannot be retried, much less convicted. In India (presumably owing to the special reasons) the immunity from retrial and conviction has been somewhat modified and it is open to the Local Government to present an appeal against an acquittal. So in India a man's immunity from retrial and conviction is subject to the fact that the Local Government can institute an appeal against his acquittal. But it has always been held and it always should be held, that this power to appeal is a power vested in the Local Government, and that no right to appeal is possessed by a private person, while this High Court has laid down that an order of acquittal cannot be changed into an order of conviction in revision, it is to be noted that in so far as the accused person is concerned it is difficult to see how he is better off if at the instance of a private prosecutor his order of acquittal is quashed, a retrial is ordered, and he is subsequently convicted. When this procedure is adopted and the man who has been legally acquitted is retried by an order in revision and then convicted, the private individual has gained by another method the privilege to which he is not entitled under the law. He has appealed against the acquittal and appealed against it successfully....it is laid down as a general rule and the binding rule that except in the most serious cases and in the event of grave miscarriages of justice no High Court shall interfere in revision in such matters. The case before me is of the most trivial. Whether the decision was right or wrong, it is idle to suggest that there has been a miscarriage of justice. As far as law and order are concerned

(2) [1904] 27 All. 359=(1904) A. W. N. 278.

(3) A. I. R. 1922 All. 487=44 All. 332.

(4) A. I. R. 1921 All. 76.

as far as the peace of the District is concerned and as far as the interests of the people are concerned, it is absolutely immaterial whether the accused person was convicted or acquitted."

These observations lay down a very useful rule of practice, and very fittingly apply to the facts and circumstances of the present case.

In *Fauzdar Thakur v. Kasi Chowdhary* (5), the same question had been raised before Jenkins, C. J., and Teunon, J., and their Lordships having differed the question was referred to Fletcher, J., who agreed with the learned Chief Justice, whose following observations may be usefully quoted from page 616 of the report:

As I have already indicated, I am not prepared to say the Court has no jurisdiction to interfere on revision with an acquittal, but I hold it should ordinarily exercise this jurisdiction sparingly and only where it is urgently demanded in the interests of public justice. The view does not leave an aggrieved complainant without remedy: it would always be open to him to move the Government to appeal under S. 417, and this appears to me to be the course which should be followed.

This pronouncement of the Chief Justice has been accepted as correctly interpreting both the provisions of the law and the established practice of the different High Courts in the following cases: *Pramatha Nath Barat v. P. C. Lahiri* (6), *In re Faredoon Cawasji Parbhu* (7) (where the petition for revision was rejected on the ground that no matter of general public importance was involved nor were the interests of public justice closely concerned, it being held that interference was not justifiable except on some very broad ground of the exceptional requirements of public justice); *Vellayanambalam v. Solai Servai* (8), (where it was further pointed out that the High Court will not interfere with an order of acquittal, where the question is one as to the appropriation of evidence, or where there is no patent error of defeat in the order which has resulted in grave injustice). There is thus a consensus of opinion amongst the Judges of the several High Courts on this point. As already stated above, this Court also has been following

the same rule of practice, with perhaps a single exception in the case of *Rani Sundrabai v. Kishore Singh* (2), cited above where the learned J. C., taking into consideration the exceptional circumstances of the case and the personal character of the offence of defamation involved therein, thought that the case was one in which the Local Government would seldom have been willing to appeal from the order of acquittal, and therefore interfered in revision at the instance of a private prosecutor.

In the face of this long array of authoritative decisions of the several High Courts including this Court, it is futile to argue that this Court is bound to entertain the revision at the instance of the complainant Sherkhan and interfere with the acquittal. Nothing that has been said in the argument in connexion with the preliminary objections or the merits of the case, induces me to hold that there has been any miscarriage of justice, or that interference is called for either in the interests of law and order or in the interests of public justice, or in the interests of the people of the district. I have been taken through the several documents, which have any bearing on the question of perjury by the accused, and have patiently heard and given my mature consideration to the criticism levelled by the complainant's pleader against the conclusions drawn by the Sessions Judge and also the reasoning on which they are based, and I am firmly of opinion that the learned Sessions Judge, who is an officer of long standing and ripe experience, has rightly given to the accused the benefit of doubt. It was open to that Judge to accept or not to accept the explanation of the accused, but since he has accepted it, I do not think that he acted improperly in holding that the conviction for perjury under 193, Indian Penal Code, could not be sustained as the evidence on record was not such as excluded the possibility of any hypothesis than that of prisoner's guilt. I think this view of the Sessions Judge is well supported by the rulings in *Queen v. Ahmed Ally* (9) and *Emperor v. Bankatram* (10) which lay down what is necessary to be proved in order to secure the conviction of a person for giving false evidence.

(5) [1915] 42 Cal. 612=21 C. L. J. 53=27 I. C. 186=19 C. W. N. 184.

(6) [1920] 47 Cal. 818=59 I. C. 37=22 Cr. L. J. 5.

(7) [1917] 41 Bom. 560=10 I. C. 316=19 Bom. L. R. 354.

(8) [1916] 39 Mad. 505=28 M. L. J. 692=30 I. C. 152=(1915) M. W. N. 540.

(9) 11 W. R. Cr. 25.

(10) [1904] 28 Bom. 533=6 Bom. L. R. 379.

As a matter of practise, this Court will not go into evidence as a rule, in revision; it will ordinarily confine its interference to cases of exceptional circumstances, or where there is error of law; nor will it interfere with the acquittal unless the trial has been illegal or so radically and incurably irregular as in fact to have occasioned a failure of justice: see *Bindaprasad v. Ripusudan* (1) following *Emperor v. Baiju* (11) where Stevens, J. C., laid down that

a retrial should only be ordered in cases of acquittal in which the trial has been radically and incurably defective.

I see no valid reason to interfere in revision at the instance of the private prosecutor, as in my opinion, the case is not one of such public importance as to demand my interference in the interests of public justice. If I may say so, the complainant does not appear to me to be anxious so much to secure due administration of justice as to serve his personal grudge or end, by pressing for the setting aside of the acquittal. I am further of opinion that, as observed by Stuart, J., in *Pahalwan Singh v. Sahib Singh* (4) I would be withdrawing from the accused the protection which he has earned by reason of the Local Government's omission to appeal against the acquittal, if I were to subscribe to the view urged by the applicant that instead of myself converting the acquittal into a conviction which is expressly prohibited by sub-S. (4) of S. 439, Criminal Procedure Code, I should bring about the same result by remanding the case to the Sessions Judge for reconsideration of the evidence bearing on the question of the guilt or the accused. As pointed out in *Vallayanambalam v. Solai Servai* (8) where the question is merely as to the appreciation of doubtful evidence and there is no patent error or defect in the order of acquittal passed by the lower Court resulting in grave injustice, the High Court should not interfere with an order of acquittal. Applying this test to the order of acquittal under consideration, I am of opinion that the utmost the criticism levelled against it does, is to question the appreciation of the evidence as made therein, and nothing more. No attempt was made to point out any patent error or defect in the order of acquittal which

might be said to have resulted in grave injustice. If the law allows a Court to punish an accused for his mistaken belief, the accused has had enough of it in having to defend himself against the charge all this while, and I think that the circumstances of the case do not call for any further action, at this stage. The petition for revision thus fails both on the preliminary objection as also on the merits and I accordingly dismiss it. The rule which was issued calling upon the non-applicant to appear and show cause why the conviction should not be restored is hereby discharged, and the bail bond executed by him is ordered to be and is hereby cancelled.

G.B.

Revision dismissed.

A. I. R. 1927 Nagpur 175

HALLIFAX, A. J. C.

Manmohan Singh—Defendants—Appellants.

v.

Bishal Singh—Plaintiff—Respondent.
Second Appeal No. 584 of 1925, Decided on 18th January 1927, from the decree of the Addl. Dist. J., Bilaspur, D/-16th September 1925, in Civil Appeal No. 52 of 1925.

(a) *C. P. Land Revenue Act* (1917), S. 156—*To claim set-off no agreement is necessary.*

S. 156 does not contemplate an agreement between parties in order to entitle a co-sharer to claim set-off although it cannot be claimed without the permission of the Court.

[P. 176 C. 1]

(b) *C. P. Land Revenue Act* (1917), Ss. 192 and 187(5)—*Sadar Lambardar—Remuneration.*

Sadar Lambardar as such is not entitled to any remuneration. *A. I. R. 1926 Nag. 274, Foll.*

[P. 176, C. 1]

G. R. Deo—for Appellant.

M. R. Bobde—for Respondent.

Judgment.—The parties are co-sharers in four villages, in all of which the plaintiff is Lambardar or Sadar Lambardar, and he sued for the recovery of sums paid by him for the defendant as land-revenue for one of the villages. The defendant alleged that there was an express agreement that from the money due to him for this village should be deducted the money due to him for the others, and if he and the plaintiff are still sane, there can be little doubt that

(11) [1893] 6 C. P. L. R. 15.

there was such an agreement. In the lower appellate Court, however, it was held "that the agreement was not proved, and the learned Judge went on to say that in the absence of an agreement S. 156 (of the Land Revenue Act) forbids any claim by way of set-off".

The section mentioned, says nothing about any agreement; it forbids a set-off in the absence of the permission of the Court, a permission which could not possibly be refused in this case in respect of proper items in any of the four villages. As to the village of Akaltara, for which the original claim is made, a sum of Rs. 82-8-0 has been allowed as lambardari haqq. But the plaintiff is Sadar Lambardar of that village and, as was explained in *Anandrao v. Daulat* (1) a Sadar Lambardar is not entitled to any such payment. It is also admitted by the defendant appellant that he is bound to pay the Rs. 8-8-0 disallowed, which the plaintiff had to pay as the costs of executing a warrant for the recovery of the land-revenue.

The first sum which the defendant proposes to set-off is the difference in the rents of the occupancy holding of each in the other's patti in Akaltara. The difference is Rs. 47-4-0 for each year. The defendant's claim for the first kist (twelve annas) of the year 1920-21 was barred by time when this suit was filed, but that for the second kist of that year and for the whole of the rent for the two following years was not. On this account therefore he is entitled to a credit of Rs. 106-5-0.

In the villages of Khond and Dhorla the parties are Superior Proprietors, and the plaintiff as Lambardar recovered Rs. 120 a year as malikana for the two villages. Of this he has to pay Rs. 60 a year or Rs. 180 for the three years to the defendant.

The last item claimed by the defendant is of the costs of a partition of Dalha which was made by a Revenue Officer, as he actually paid them all. These he alleged to amount to Rs. 397-8-0, but they were found in the first Court to amount to Rs. 315-0-0 only. The finding is based on the mistaken idea that the sum stated by the Revenue Officer before the proceedings began, as his estimate of the probable costs of making the partition, was the sum allowed as costs in his

final order. The defendant has, however, agreed to accept Rs. 315-0-0 as the actual costs of the proceedings, and he is therefore entitled on this account to Rs. 157-8-0.

In respect of proper items the plaintiff must of course be given the same permission as that given to the defendant. He claims in the first place a sum of Rs. 3-0-0 a year as his lambardari haqq for the two villages of Khond and Dhorla, where he is lambardar and not Sadar Lambardar. This credit of Rs. 9-0-0 to the plaintiff for the three years is accepted by the defendant. The defendant also admits that the plaintiff paid a sum of Rs. 51-0-0 as cesses for the village of Dalha during the three years, of which he has to pay half, that is Rs. 25-8-0.

All these items are undoubtedly such that permission ought to be given to take them into account in this suit. The plaintiff has asked for the same permission in respect of three more sums. It is alleged that in Dalha in 1921-22 three thousand trees worth Rs. 1,000-0-0 were cut clandestinely and confiscated by the plaintiff but the defendant took possession of them and sold them, and also that the defendant has been all along realizing grazing dues amounting to not less than Rs. 200 a year, in defiance of the authority of the Lambardar. In regard to Akaltara it is alleged that at the partition made in 1914 the demarcation of the abadi was wrong and gave the defendant certain plots that really belonged to the plaintiff; it took till 1920 to set the matter right and during that time the defendant realized Rs. 546-0-0 as nazarana for some of those plots.

These three claims only require stating to show that permission ought not to be given to set them off in this suit. The result of the account then is that the amount decreed by the Courts below must be reduced by Rs. 483-5-0 that is to Rs. 1,147-12-9. The plaintiff will pay one quarter of the total costs of both parties in the first Court and a half of those in each appellate Court, and the defendant will pay the rest. It is not necessary to fix any pleader's fee for this Court.

G.B.

Appeal allowed.

(1) A. I. R. 1926 Nag. 274=22 N. L. R. 37.

* A. I. R. 1927 Nagpur 177

FINDLAY, J. C.

Narayan and others—Defendants—Appellants.

v.

Vithoba and another—Plaintiffs—Respondents.

Second Appeal No. 112 of 1926, Decided on 15th December 1926, from the decree of the Dist. J., Nagpur, D/- 23rd November 1925, in Civil Appeal No. 188 of 1925.

* (a) *Civil P. C., Sch. 3, Para. 11—Agreements to transfer in future are not affected.*

The word "alienate" in Para. 11 of Sch. 3, is used ejusdem generis with the preceding words "mortgage, charge and lease." The provision of Para. 11 does not prohibit the transfer in future of an interest in the property but only lays an embargo against the transfer of the present interest therein, and as an agreement to sell does not create a present interest in the property, it is not affected: 33 *All. 233, Foll.* [P 178 C 1]

(b) *Transfer of Property Act, S. 54—Contract to sell creates merely a personal right.*

A contract to convey in future an immovable property for certain amount is only a personal contract and gives rise to a right in personam which may be satisfied either by the performance of the specific act in question or by the giving of compensation: 39 *Mad. 462, Foll.* [P 178 C 1]

(c) *Transfer of Property Act, S. 54—Sale found void—Agreement to sell cannot be implied to arise out of it.*

In the case of a sale, which is found to be statutorily void, an independent agreement to sell cannot be implied to arise out of the transaction; assuming such an agreement can be implied, the sale being void, the agreement perishes with it. [P 178 C 2]

(d) *Part performance—Transaction void ab initio—Doctrine cannot be applied.*

Where the flaw in the transaction is not a mere defect of form or the absence of some formality normally necessary, but the transaction is one which is void ab initio, the doctrine of part performance cannot be applied. [P 179 C 2]

(e) *Mortgage—Mortgagee's right to possession as against vendee from mortgagor.*

A mortgagor, unless he has foreclosed, is not entitled to keep the vendee from the mortgagor out of possession of the mortgaged property: 19 *All. 541, Foll.* [P 179 C 2]

(f) *Transfer of Property Act, S. 8—Transfer of village share—House appurtenant to such share cannot be retained.*

Where a share in a village is transferred, any house or kotha which is appurtenant to such share cannot be retained unless expressly excluded. [P 180 C 1]

M. R. Bobde—for Appellants.

M. B. Niyogi—for Respondents.

Judgment.—The plaintiffs, Vithoba and Sambhaji brought this suit in the 1927 N/23 & 24

Court of first Subordinate Judge, 2nd class, for possession of a two annas share in mouza Devali and a fourth share in the house and kotha specified in para. 6 of the plaint. Nago, Ramnath and Maroti, now deceased, whose widow is Mt. Gaji, owned an eight annas share in the village as well as in the house and kotha in question. The plaintiffs rely on a sale-deed, dated 30th June 1924, (Ex. P. 1) executed by Nago in their favour. On 22nd March 1917 Ramnath, Nago and Mt. Gaji, widow of Maroti, had sold their eight annas share and the house and Kotha to Dhanu, the father of Defendants 1 and 2, Narayan and Govinda. Defendants 3 and 4 are the nephews of Defendants 1 and 2, and all the four defendants constitute a joint Hindu family. Dhanu and all the defendants have been in possession of the two annas share and of the house and kotha in question since the sale in their favour. It, however, transpired in another suit that the sale in favour of Dhanu was effected while Collector's proceedings were pending in respect of Nago's two annas share. The plaintiffs, in those circumstances, came to Court claiming the subjects as stated.

The Subordinate Judge, on the issues which arose on the pleadings of the parties, held that the sale deed of 30th June 1924 had been duly executed for consideration. He further held that the doctrine of part-performance did not apply to the case, inasmuch as the sale-deed in the defendant's favour was void *ab initio*; that no separate agreement to sell could be implied from the sale-deed in the defendants' favour and that, even if there had been a previous oral agreement to sell, it could not revive after the sale-deed was found to be void. On these findings decree was granted in respect of the two annas share to the plaintiffs, but the relief as regards the house and kotha was refused, because in the opinion of the Subordinate Judge these had not come under the purview of the Collector in the execution proceedings.

The defendant appealed to the Court of the District Judge, Nagpur, and the plaintiffs filed a cross-objection with reference to the disallowance of the relief as regards the house and kotha in question. The learned District Judge allowed the cross-objection but dismissed the

appeal, and the defendants have now come up on second appeal to this Court.

A long and elaborate argument has been addressed to me on the assumption that there was in the present case an agreement to sell. Even admitting that the sale in Dhanu's favour was a void one, it has been urged that, with reference to para. 11, Sch. 3 of the Civil P. C., the said provision does not prohibit the transfer in future of an interest in the property but only lays an embargo against the transfer of the present interest therein. This was the principle laid down in *Muhammad Sayeed v. Muhammad Ismail* (1) by Stanley, C. J., and Banerji, J. The word "alienate" in para. 11 of the Schedule quoted above was held to be used *ejusdem generis* with the preceding words "mortgage, charge and lease." I see no reason to differ, as at present advised, from the interpretation put by the learned Justices on the provision in question. It has been urged on behalf of the appellants that the position in the present case was exactly the same, that, if there was an agreement to sell, no present interest in the property was created: cf. S. 54 of the Transfer of Property Act, Cls. (5) and (6), and *Gharumudi v. Raghavulu* (2). In the latter case the learned Justices pointed out that such a contract as one to convey an immovable land in future for a certain amount is only a personal contract and gives rise to a right in personam which may be satisfied either by the performance of the specific act in question or by the giving of compensation.

The learned District Judge, in dismissing the appeal of the defendants, relied on the decision of Stanyon, A. J. C., in *Mt. Salu Bai v. Bajat Khan* (3), which case undoubtedly goes against the present appellants. It has been urged in this connexion that the observations made by the learned A. J. C., at p. 147 of the judgment went beyond the scope of the case and were unnecessary. I have been referred in this connexion to the decision of their Lordships of the Privy Council in *Harnath Kunwar v. Indar Bahadur Singh* (4). The facts of that

case were peculiar. The transfer therein was held to be invalid since the vendor at the time only had an expectancy. Nevertheless, their Lordships held that under S. 65 of the Indian Contract Act the purchase money was recoverable. Similarly, in *Narayan v. Motisa* (5). Prideaux, A. J. C., held that on equitable grounds when a contract was discovered to be void and when the vendor and vendee had in reality done nothing illegal with their eyes open but were only caught by the fiction that they should have known the law, restitution of the purchase money should be made. It is difficult to see, however, what precise application these cases have in the present instance.

I am far from denying that if in the present case there was any real evidence as to a separate agreement to sell in future, such agreement would have created a right in personam, which might possibly be enforced or upheld in favour of the appellants: cf. *Burjorji Curesetji Pantheki v. Muncherji Kunerji* (6) and *Vizagapatam Sugar Development Co. Ltd. v. Muthuramareddi* (7) and I am equally prepared to admit that such an agreement would not fall within the bar laid down in Para. 11 of Sch. 3 of the Civil P. C. But what are the actual facts in the present case? The pleader for the defendants, in his oral statement on 2-2-25, pleaded specifically that there was no separate oral agreement as such to sell. What was urged was that the sale-deed having been held to be inoperative in respect of the 2 anna share in suit, that, in itself, constituted an agreement to sell. In a further statement made on 18-2-25 the same pleader averred that there had been no separate agreement to sell after the sale-deed of defendants. We are, thus, left with the problem as to whether in the case of this sale, which was statutorily void, an independent agreement to sell can be implied to arise out of the transaction. I have not the slightest hesitation in answering this question in the negative. As pointed out by the Subordinate Judge, every sale necessarily implies a previous agreement to sell, although "previous" may only mean a moment or two before.

(1) [1911] 33 All. 233=8 I. C. 834=7 A. L. J. 1176.

(2) [1916] 39 Mad. 462=28 M. L. J. 471=23 I. C. 871=(1915) M. W. N. 596.

(3) [1917] 13 N. L. R. 130=42 I. C. 200 (F. B.).

(4) A. I. R. 1922 P. C. 403=45 All. 179 (P. C.).

(5) A. I. R. 1924 Nag. 132=20 N. L. R. 87.

(6) [1880] 5 Bom. 143.

(7) A. I. R. 1924 Mad. 271=46 Mad. 919 (F. B.).

Moreover, even if we assume, there was such an agreement, it was obviously an agreement to sell there and then and not at any future date; and the sale being invalid and void, it seems to me clear that the connected agreement, which was an *ad hoc* one only having reference to that sale on the day in question, necessarily merged in the sale also and perished along with the said sale-deed.

I find myself in full agreement with what are, in my opinion, the very pertinent observations of Stanyon, A. J. C., made at pp. 145-147 of 13 N. L. R. 130 quoted above. The vendor, at the time he entered into the sale transaction in question and on the pleadings it must necessarily have been at that time the agreement to sell also took place, was incompetent to contract. Very obviously, the attempt to deduce from the evidence what may be called a theoretical agreement to sell is a hopeless one in the circumstances of the present case. The whole transaction stood or fell together and, in the circumstances of the present case, both were undoubtedly void. I need hardly add that the position would have been entirely different if there had been an agreement to sell after the Collector's proceedings had ended and in this sense it may be true that although the person incompetent to contract is incompetent to transfer, the converse always cannot be implied, viz., that a person incompetent to transfer is incompetent to contract. For these reasons I find myself in full agreement with the finding arrived at by the learned District Judge in paragraph 2 of his judgment.

The next point, which has been pressed on behalf of the appellants, is that the equitable doctrine of part-performance applies to the present case. Dhanu and the defendants after him have admittedly been in possession of the subjects as a consequence of the sale-deed of 22-3-17. It has been suggested that the plaintiffs are, therefore, debarred from disturbing the defendants who are in possession in consequence of a transaction which was entered upon and carried out by the parties thereto. *Mahomed Muza v. Aghore Kumar Ganguli* (8), *Lakshmi Venkayamma Rao*

(8) [1915] 42 Cal. 801=28 I. C. 930=42 I. A. 1 (P. C.).

v. Venkata Narasimba Appa Rao (9) and *Vizagapatam Sugar Development Company v. Muthuramareddi* (7) have been relied on in this connexion. A perusal of these cases will show that they are not, in reality, parallel to the present case in any respect. Here the flaw in the defendants' position is not a mere defect of form or the absence of some formality normally necessary. The transaction was one which was void ab initio and no recourse to equity can be had with the object of defeating a law, or of enforcing what is expressly forbidden by law. It would be a misapplication, indeed, of the principles of equity to apply in the present the equitable doctrine of part-performance. Any such application would have the direct and immediate effect of setting at naught both the letter and spirit of the law as contained in paragraph 3 of Schedule 3 of the Civil P. C. I fully agree with the finding of the learned District Judge in this connexion and must reject the proposition which has been advanced on behalf of the appellants.

The next ground of appeal, which has been argued on behalf of the appellants, is that, even if the sale and the so-called agreement to sell go by the overboard, the defendants are entitled to fall back on their mortgage which in consequence revives, and it has been suggested that the plaintiffs' remedy was not to sue for possession but to claim redemption of the defendants' mortgage. I am wholly unable to appreciate this proposition and know of no reason why the plaintiffs were not entitled to come to Court, as they have done, and claim possession under their sale-deed (Ex. P. 1.). A separate suit on the mortgage, has, I am informed, been instituted and the rights of the parties with reference to the mortgage will be more suitably and satisfactorily disposed of therein. Moreover, until the mortgagee forecloses, he cannot get possession and I know of no authority for the view that the mortgagee, can on the grounds stated, keep the plaintiffs-respondents out of possession: cf. *Hargu Lal Singh v. Gobind Rai* (10).

The final point, which has been urged on behalf of the appellants, is that the

(9) [1916] 39 Mad. 509=34 I. C. 921=43 I. A. 138 (P. C.).

(10) [1897] 19 All. 541=(1897) A. W. N. 154 (F. B.).

decree of the first Court should be restored in respect of the house and kotha. The Subordinate Judge excluded the house and kotha on the ground apparently that they were not appendages to the village share, while the learned District Judge held otherwise and decreed the plaintiffs' claim in that respect. In my own opinion, the house and kotha must be clearly regarded as incidental to, and bound up with, the 2 anna share in question: cf. S. 8 of the Transfer of Property Act and *Shiolal v. Nanhelal* (11). In the absence of any words excluding the house and kotha, which were obviously appurtenant to the share, these two subjects cannot, in my opinion, be retained for the benefit of the appellants.

In the final ground of appeal, which was not, however, argued before me it is urged that the order of the lower appellate Court as to costs was inequitable and unjust. For my own part, I concur in the opinion expressed by the learned District Judge and do not think any question of equity arises in this connexion. The plaintiffs in the present suit are doing no more than enforcing what are their legal rights and, in those circumstances, I disagree with the Subordinate Judge in thinking that they should be deprived of their costs.

These findings govern the appeal which is dismissed. The appellants must bear the respondents' costs. Costs in the lower Courts as already ordered.

G.B.

Appeal dismissed.

(11) [1912] 8 N. L. R. 123=17 I. C. 129.

* A. I. R. 1927 Nagpur 180

KINKHEDE, A. J. C.

Ghasia—Defendant—Appellant.

v.

Thakur Ramsingh and others—Plaintiffs—Respondents.

Second Appeal No. 436 of 1924, Decided on 16th December 1926, from the decision of the Dist. J., Nimar, D/- 28th July 1924, in Civil Appeal No. 216 of 1923.

* (a) *Evidence Act, S. 115—Consent and ratification—Consent precedes transaction while ratification is subsequent.*

A plea of consent to a transaction must always be distinguished from a plea of ratification.

Consent imports either an express or implied agreement to waive one's own election to avoid transaction which two or more other persons are negotiating or about to enter into; as such it precedes the transaction and gives strength to it so as to enable the parties to that transaction to complete it on its basis. Whereas a ratification is subsequent in point of fact and time to the transaction which is voidable. [P 182 C 1]

(b) *Evidence Act, S. 115—Estoppel by acquiescence—Conduct of party sought to be estopped must necessarily imply a contract to allow other party to continue his right to possession—Distinction between acquiescence when the act is in progress and acquiescence after the act is done, indicated.*

In order to sustain a plea of acquiescence and to raise the bar of an equitable estoppel, it is incumbent upon the party relying on it to show that the conduct of the owner whether consisting in abstinence from interfering, or in active intervention, was sufficient to justify the legal inference that he had, by plain implication, contracted that the right of occupation under which the other party originally obtained possession of the land, should be changed into a perpetual right of occupation.

Acquiescence by the landlord is a question of legal inference drawn from the facts found.

There is a distinction between a case where the acquiescence allowed occurs while the act acquiesced in, is in progress, and another, where the acquiescence takes place after the act has been completed. In the former case, the acquiescence is acquiescence under such circumstances that assent may be reasonably inferred from it. In the latter case, when the act is completed without any knowledge or without any assent on the part of the person whose right is infringed, the matter must be determined on very different legal considerations. A right of action has then vested in him, and mere delay to take legal proceeding to redress the injury cannot, by itself, constitute a bar to such proceedings, unless the delay on his part, after he has acquired full knowledge has affected or altered the position of his opponent: 19 C. W. N. 882, *Ref.* [P 183 C 1]

(c) *Civil P. C., S. 100—Bald pleas of parties recorded but parties not examined on the points—Real points in dispute ignored—Trial is vitiated and can be set aside in second appeal.*

Where only the bare or bald pleas of the parties are on record but there is no attempt to focus their contention by proper examination of parties by the Court, with advertence to the law bearing on the point and the real points are missed, the trial is vitiated and decision is liable to be ignored even in second appeal: 47 Cal. 107 (P. C.) and A. I. R. 1924 Nag. 91, *Foll.* [P 184 C 2]

Y. V. Jakatdar and M. K. Padhy—for Appellant.

S. B. Gokhale—for Respondents.

Judgment.—I think this case has not been tried on proper lines. The real question to be decided has not been properly grasped; nor were proper issues framed; the trial has consequently been wholly vitiated. There is much which

though necessary for the proper adjudication of the case has been left unascertained and undecided. This was pre-eminently a case for the personal examination of the parties. The principal question in the case was of the acquiescence on the part of the landlord in the right of the defendant to occupy the premises purchased by him on 31-5-1921.

Both the Judges have looked askance at the defence and have rejected the defendant's plea of acquiescence as an afterthought. The site in dispute was formerly in the occupation of one Babulal Brahman as a building site and his house stood on it. He sold it to the defendant for Rs. 300 by a registered deed dated 31-5-21. The plaintiffs who together with Defendant No. 2 constitute the whole proprietary body instituted the present suit on 18-10-1922 for ejectment of the defendant on the ground that Babulal had no right to sell the site, and consequently the defendant acquired no right to occupy it against their will.

The plaintiff's cause of action accrued on 1-6-1921. They alleged that they demanded possession of the vacant site several times till 1-8-22 but without success. On 7-12-22 the defendant put in a written statement alleging that he purchased the house together with the site from Babulal with the full knowledge and consent of all the plaintiffs and Defendant No. 2 also who on transposition later on became Plaintiff No. 9; that after his purchase he rebuilt the house and made improvements bona fide; that the plaintiffs had full knowledge of this fact but never objected to the building of the house. He therefore contended that the plaintiffs were estopped from claiming the site after demolishing his house.

On 7-12-22 certain facts were ascertained by Court from the parties. The defendant then stated that he commenced to build upon the site soon after his purchase and completed it about two months ago, at a cost of about Rs. 300. Plaintiffs replied that they never consented to the defendant's possession or purchase as alleged. They denied that the defendant rebuilt the house on the site in suit and incurred the alleged expenditure; they alleged that the defendant was asked to vacate the site soon after the purchase but the latter refused to vacate.

After these pleadings parties opened negotiations for a compromise, and as Rambhau, Defendant No. 2, was not served plaintiffs gave him up on 9th January 1923, and took time to effect a compromise out of Court. The defendant however remained absent at the next hearing and the case proceeded ex parte against him, the ex parte order was however subsequently set aside, the terms of the compromise recorded and as the Court thought it was necessary to examine plaintiffs, it gave an order for their personal presence in Court on 10th April 1923. That day defendant did not press the compromise as a bar to the decision of the suit on its merits and the case accordingly went to trial on the merits; therefore the plaintiffs thought of reimpleading Rambhau the discharged defendant, and with his consent made him a co-plaintiff No. 9 on 16th June 1923. The array of parties was thus made proper and completed on 16th June 1923, and it was then and not till then that a properly constituted suit by all co-proprietors was before the Court. Defendant naturally turned this opportunity to his advantage and filed a written statement on that very day raising the following among other pleas:

(2) Paragraph 2 of the plaint is admitted; that the defendant purchased the house of Babulal on 31st May 1921 under the following circumstances:

(a) The defendant had purchased a padit land and paid Rs. 85 as nazrana to the plaintiff Ramsing and took possession of the padit land.

(b) The defendant was then in need of making another house for his son who was married and wanted to live separate in food on account of family quarrel.

(c) The defendant collected materials to build the house when about two years ago the plaintiff requested the defendant not to build the house and consented to the purchase of the house of Babulal for Rs. 300 in lieu of the padit plot and rebuilt this house with the materials collected for building the house on the padit land. This cost the defendant Rs. 300 and the nazrana paid for padit land was set off in that purchase.

(3) Plaintiff and Rambhau had full knowledge and this house was reconstructed under their advice and hence they were estopped from claiming the site after demolishing the house.

(7) Plaintiffs cannot now resile from their contract and take advantage of their own fraud. Defendant files the deed dated 3rd June 1911 to support his claim.

The plaintiffs' pleader was given time for a reply and the Plaintiff No. 1 Ramsingh was ordered to be personally pre-

sent in Court on 29th June 1923 which was fixed for the settlement of issues. He however did not attend in person and plaintiffs' pleader Mr. Ghate made a statement admitting that the defendant paid Rs. 85 to the plaintiffs as nazarana for a padit site granted to the defendant as per receipt dated 3rd June 1917 (Ex. D-2). It was, however, denied that the plaintiffs got back the site and consenting to the defendant's purchase of the house in suit. The allegations in paras. 2 (b), (c) and (3) were also denied. It was asserted that the padit site taken on 3rd June 1917 by the defendant continued in his possession as before even after 3rd June 1917. Plaintiff Rambhau denied knowledge of the defendant's purchase of the padit site and the house in suit, and asserted that he never consented to any of the transactions. The only issues framed with reference to these pleas were Nos. 1, 2 and 3 which are reproduced below :

(i) Whether the defendant purchased the house with the consent of the lambardar Ramsing as pleaded in para. (2) (c) of the additional written statement ?

(ii) Whether the defendant rebuilt the house with the consent and knowledge of the plaintiffs ?

(iii) Are the plaintiffs estopped from claiming possession of the site in suit as pleaded ?

I think the learned District Judge was right in observing in para. 3 of his judgment that

This was obviously a case where the examination of the parties themselves was desirable. The trial Judge had realised this when he ordered that Plaintiff No. 1 should attend in person.

Plaintiff Rambhau was not examined either as a party or as a witness in the case. The District Judge, therefore, rightly concluded that "the defendant was somewhat prejudiced" as "He would not summon Ramsingh as a witness when he has been ordered to attend by the Court." As regards Ramsingh's omission to go into the witness-box and the defendant's omission to move in the matter and the Court's failure to enforce its order he remarked that

This is unsatisfactory, and on the whole . . . the appellant is entitled to some consideration. It seems to me to have been the duty of Ramsingh to have entered the witness-box. In fact the only witness for the plaintiff was the man who was formerly made a defendant.

(This is a mistake. Gangaram was examined as P. W. 1. Rambhau and not he was the former defendant.) These obser-

vations give an impression to me that in the opinion of the District Judge the disposal of the case by the first Court was on the whole not satisfactory. In spite of this he shared the view of the first Court that the plea about the nazarana raised in the written statement dated 16th June 1923, was suspicious and an afterthought. I am not prepared to uphold this kind of disposal of the matters involved in a case of this kind. Really speaking, the written statement dated 16th June 1923 which was by way of amplification of the pleas already raised but concisely stated in the previous written statement dated 7th December 1922, could not be looked upon as raising an altogether 'new matter,' or, a plea which could be termed as an 'afterthought.' On the contrary it appears to me that, in spite of the above amplification by the defendant made voluntarily and of his own accord, there were still left several points on which the defendant and the plaintiffs should have been examined.

A plea of consent to a transaction must always be distinguished from a plea of ratification. Consent imports either an express or implied agreement to waive one's own election to avoid transaction which two or more other persons are negotiating or are about to enter into; as such it precedes the transaction and gives strength to it so as to enable the parties to that transaction to complete it on its basis. Whereas a ratification is subsequent in point of fact and time to the transaction which is voidable. It was consequently necessary for the trial Court to focus the contentions of the parties with proper attention to this point of distinction. The pleas raised by the defendant in both the written statements were in substance two (1) of consent to the purchase before it was concluded and (2) of acquiescence and estoppel arising out of the alleged consent prior to the transaction, and also out of subsequent conduct and standing by i. e., the want of objection to the defendant's outlay of considerable expenditure on improvement of the premises he purchased. It must be remembered that in order to sustain a plea of acquiescence and to raise the bar of an equitable estoppel, it is incumbent upon the party relying on it to show that the conduct of the owner whether consisting in abstinence from interfering, or in active in-

tervention, was sufficient to justify the legal inference that he had, by plain implication, contracted that the right of occupation under which the defendant originally obtained possession of the land, should be changed into a perpetual right of occupation ; as held in *Beniram v. Kundan Lal* (1) acquiescence by the landlord was a question of legal inference drawn from the facts found.

There is a distinction between a case where the acquiescence alleged occurs while the act acquiesced in is in progress, and another, where the acquiescence takes place after the act has been completed. In the former case, the acquiescence is quiescence under such circumstances that assent may be reasonably inferred from it. In the latter case, when the act is completed without any knowledge or without any assent on the part of the person whose right is infringed, the matter must be determined on very different legal considerations. A right of action has then vested in him, and mere delay to take legal proceedings to redress the injury cannot, by itself, constitute a bar to such proceedings, unless the delay on his part, after he has acquired full knowledge has affected or altered the position of his opponent : cf. *Syama Charan Baisya v. Prafulla Sundari Gupta* (2). It therefore follows that delay will necessarily count against any person who has shown his quiescence under circumstances from which assent may be reasonably inferred as a matter of legal inference. Assuming that the defendant's improvements were in progress to the knowledge of the plaintiffs the law had cast on them a duty to raise their voice and restrain the defendant ; if at that stage they remained quiet or abstained from objecting, and after the improvements were completed they raised their head and sought the Court's help for issuing a mandatory injunction to the defendant to dismantle the new structure on the improvements effected and deliver possession of their site in a vacant state, the Court might reasonably be justified, in view of the altered situation, in thinking that the plaintiffs were equitably estopped, from raising, their belated objection, lodged for the first

time in the form of suit, on the ground that it was not preceded by a prior demand or objection, at the earlier moment when they became aware of the infringement of their rights in the village site.

This Court has laid down the law in *Narain v. Behari* (3) that the failure on the part of the landlord to raise an objection in time raises an implication, of a grant of a new license, or of the continuation, in favour of the transferee of the superstructure, of the one already enjoyed by the former occupant of a house site in the village abadi. If in the case of a person who acquires the superstructure merely, and remains in undisturbed occupation for some time, the equity raises the implication of a new license or of the continuation of the old, and thus bars the landlord's right of avoidance of the transfer, much more effectively should the bar operate against him, if he, knowing that the transferee having entered into possession of the house site (which really is the landlord's property) has commenced to expend labour and capital in improving it for his own benefit, keeps quiet over the affairs, and thereby, impliedly encourages him to go on incurring the expenditure. What time and what conduct will suffice to raise such a bar is a matter which must always depend upon the particular circumstances of each case.

There is some slight indication in the pleadings of these matters, but the parties have not been properly examined, which must now be done.

The defendant raised the plea that Rs. 85, which were paid in respect of another site granted to him, were retained by the plaintiffs in lieu of their consenting to the transaction in suit, and by way of support, the defendant asserted that, old site was abandoned by him, and that, the same was in plaintiffs' possession. The plaintiffs had denied this allegation of the defendant. This point of plaintiffs' possession over the site once granted was a very crucial point in the case. It does not appear to have formed the subject of any issue or decision in the Courts below.

It is again a question whether in this particular village the Lambardar has been exercising his statutory powers under S. 188, Land Revenue Act, unfettered by

(3) [1915] 11 N. L. R. 126=31 I. C. 307.

(1) [1899] 21 All. 496=26 I. A. 58=7 Sar. 523 (P. C.).

(2) [1915] 19 C. W. N. 882=30 I. C. 161=21 C. L. J. 557.

the concurrent or co-ordinate exercise of similar powers by the other co-sharers acting individually in themselves. This point has not been properly threshed out in the Court below.

In short all the bare or bald pleas are there, but there is no attempt to focus their contention by proper examination of parties by the Court, with advertence to the law bearing on the point. The trial is consequently vitiated and the real points being missed the decision is liable to be ignored even in second appeal: *Damusa v. Abdul Samad* (4) and *Tukaram v. Chintaram* (5). The case is accordingly remanded for trial *de novo* after proper examination of the parties on proper lines with advertence to the above remarks.

The appeal is allowed. The appellant will get a refund of Court-fees paid in this Court and in the District Judge's Court and the case is remanded to the Court of first instance. Costs exclusive of Court-fee paid on plaint hitherto incurred will remain as spent.

G.B.

Case remanded.

- (4) [1920] 47 Cal. 107=51 I. C. 177=15 N. L. R. 97=46 I. A. 140 (P. C.).
 (5) A. I. R. 1924 Nag. 91=20 N. L. R. 17.

* A. I. R. 1927 Nagpur 184

KINKHEDE A. J. C.

Tularam Marwadi—Accused—Applicant.

v.

Emperor—Non-Applicant.

Criminal Revision No. 419 of 1926, Decided on 15th December 1926, from the order of the 1st Cl. Mag., Bhandara, D/- 25th August 1926, in Criminal Case No. 56 of 1926.

* (a) *Guardians and Wards Act—Proceedings for appointment of guardian—Proceedings are pending till minor attains majority and Court acts not in administrative or executive capacity but as "Court" within the meaning of Criminal P. C., S. 195 (c).*

The proceedings under the Guardians and Wards Act, once initiated by an application either for appointment or for declaration of a guardian last or continue throughout the minority of the minor concerned and the filing of the papers do not put an end to the proceedings. The Court appointing the guardian, when it receives the report of the guardian, does not act in an administrative or executive capacity, but as a "Court" within the meaning of S. 195 (c) Criminal Procedure Code.

[P. 187, C. 2, P. 188, C. 1]

* (b) *Criminal P. C., Ss. 195 (c) and 476—Offence under S. 468, I. P. C.,—Filing of document with an annexure is sufficient production—No proceedings need be pending before Court from before such filing.*

The mere filing of a forged document as an annexure to a petition is a sufficient production of the document in Court: A. I. R. 1922 Mad. 495 and 1923 Mad. 136, Dist. [P. 188, C. 2]

It is not at all necessary that the proceedings must be "pending" before the Court from before. Filing of a forged document together with the report of a guardian appointed under the Guardians and Wards Act before the Court appointing the guardian is production within S. 195. The Court receiving such report acts as a "Court" and not in its administrative capacity: 22 Cal. 1004, Rel. on. [P. 188, C. 2]

* (c) *Criminal P. C., Ss. 195 (c) and 476—Non-compliance with section is an illegality vitiating trial—Criminal P. C., S. 537 (amended 1923).*

The provisions of S. 195(c) read with S. 476 are imperative and non-compliance with them is an illegality not curable by S. 537: A. I. R. 1926 All. 700, Rel. on. [P. 189, C. 2]

M. R. Bobde and V. V. Kelkar—for Applicant.

G. P. Dick—for the Crown.

Order.—This revision petition is filed against an order dated 25-8-26 passed by the first Class Magistrate, Bhandara, in Criminal Case No. 56 of 1926, which was instituted under the following circumstances.

One Vithoba Koshti of Pouni in the Bhandara district died on 16-10-23 leaving behind widows and a posthumous son. Mt Zibli one of the widows presented an application dated 4-2-25 (Exhibit P-1) to the District Court, Bhandara, under the Guardians and Wards Act for the appointment of a guardian for the minor's property. Acting on information elicited in the proceedings thus initiated the District Judge added certain persons who were said to be in possession of the minor's property as parties non-applicants and the present applicant is one of them.

After recording pleadings and making an order for the appointment of an ad interim Receiver and holding the necessary enquiry and after the receipt of the report of the commissioner or Receiver as to the large sums said to be misappropriated by the non-applicant and other persons the District Judge proceeded to appoint one Mahadeo as guardian for the minor's property by a conditional order dated 18-6-25.

On the 18th of September 1925 the guardian submitted his report regarding

the minor's Pouni shop and filed along with it a will dated 16-10-23 (Exhibit P-5) handed over to him by the applicant as an authority to him and some others to deal with the minor's estate as trustees appointed by Vithoba. This will remained on the record till 11-12-25 when on the Sub-Inspector's requisition through the District Superintendent of Police it was handed over to him. In the course of the Police investigation it was discovered that the alleged will was forgery. The Sub-Inspector therefore, lodged a complaint under S. 467, of the Indian Penal Code against the applicant and some others in the 1st Class Magistrate's Court on 22-3-26. An objection was taken to the tenability of the prosecution except on a complaint by the Court in which the will was produced. The objection was summarily overruled by the Magistrate by an order dated 8-6-26 which, however, was set aside by this Court in Criminal Revision No. 272 of 1926 as per order dated 14-7-26 and the Magistrate was directed to dispose of the objection by a proper judicial order according to law. The Magistrate has now passed order dated 25-8-26 overruling the objection. The petitioner moves this Court to set aside and quash the proceedings on the ground that none but the District Court could legally start the prosecution in respect of the offence. The sole question to be considered therefore is whether in the particular circumstances of this case the prosecution could not be started except upon a complaint by the District Court, Bhandara, under S. 476 read with S. 195 (c), Criminal Procedure Code.

A brief account of the circumstances gathered from the record of the guardian and wards case is necessary for understanding the real point of contest in the case. The evident intention of Mt. Zibili in bringing the several persons before the Court as non-applicants was to apprise the Court of the real situation as to the persons who were to be brought under the Court's jurisdiction for the purposes of securing such reliefs as against them as might be obtainable by recourse to the several provisions of the Guardians and Wards Act. The instructions given by the Court in the order-sheet dated 18-8-25, are also drawn up on lines consistent with this intention. The Court gave directions as to the

manner in which the guardian was to proceed in the matter of the collection of the minor's assets and gave 1½ months time for that purpose and also warned him to obtain its "sanction for taking legal steps against any person and for meeting the expenses thereof." On taking the necessary security the order of appointment was confirmed and made final on 26-6-25. The guardian was ordered to submit accounts annually on 1st July and the first account was ordered to be submitted on 1-7-26. The guardianship certificate which was ordered to be prepared was issued to the guardian on 30th June 1925 and the District Judge passed the following order that day :

30-6-25; Applicant in person. Guardian also in person. Certificate prepared and signed and issued. Proceedings be filed now.

J. C. Chatterjee,

District Judge.

Pursuant to the instructions given on 18th July 1925 the guardian made different applications for sanctions etc., at different times; amongst them was an application accompanied by a report dated 21st August 1925 for permission to take legal steps in criminal and civil Court against Hagru, one of the non-applicants for misappropriation of Rs. 5,177-12-6. The District Judge granted the necessary permission as per his order dated 22nd August 1925. His next move was to request the Court to forward his petition dated 3rd September 1925 to the District Superintendent of Police through the District Magistrate, Bhandara, for making investigation in regard to the amounts alleged to have been misappropriated by Hagru. The Court on 5th September 1925 ordered the same to be forwarded with a covering letter for investigation; the guardian was directed to file within 10 days certain inventories he was ordered to submit. This was done as per District Judge's letter dated 8th September 1925 to the District Superintendent of Police through the District Magistrate. In para. 2 of this letter the District Judge has requested the District Superintendent of Police to make an investigation

in the matter of the alleged removal by one or more Marwadi and other money lenders of Pouni of the shop articles, books and others papers and cash appertaining to the minor's another cloth shop at Pouni.

regarding which the guardian's report was yet to come.

On 18th September 1925 the guardian filed another petition submitting his report about Pouni shop praying that his petition addressed to the District Superintendent of Police be forwarded to him for making enquiry in regard to the taking of the possession of the minor's Pouni shop by the creditors Tahlū (alias Tularam applicant), Kashinath and Ganesh Ram. The order passed thereon on 18th September 1925 is

Let it be forwarded for investigation.

J. C. Chatterjee,
District Judge.

It contains the following further instructions :

The guardian has attached a registered will to his report without making mention of it either in his petition to me or in the report. He shall file a petition as to where and how he got it and why he filed it in this Court.

J. C. Chatterjee,
District Judge.

The District Judge was somewhat mistaken in thinking that the report made no reference to the will. A reading of the report dated 18th September 1925 clearly discloses that its para. 5 expressly refers to the will handed over to the guardian by Tahlū as a document of authority empowering him and others to administer the estate of the minor as trustees. Of course there is no mention of its date. But as to the identity of the will produced there is no question. Thus the custody of the will was transferred from the applicant to the Court through the medium of the guardian who was the officer of the District Court in the matter of the administration of the minor's estate. The document thus came into the custody of the Court and formed part of the record from the date of its production on 18th September 1925 when it was filed in the course of the proceedings commenced by the guardian, subsequent to his appointment, on the strength of the Court's orders and instructions dated 18th June 1925 and 26th June 1925, with the object of obtaining the Court's sanction for starting legal proceedings against Tularam and others for misappropriation etc., of the minor's property belonging to the Pouni Shop, until it was handed over to the Sub-Inspector Bhagwandass on 11th December 1925. During this interval it remained under the custody of the Court and as a document 'produced' in a proceeding in Court.

The combined effect of Ss. 476 and 195 (c) of the Criminal P. C., as amended by Act 18 of 1923 is to substitute the complaint of a Court for its sanction in respect of prosecution for offences indicated by the latter section. The recent decided cases are in favour of the view that it makes no difference whether the offender is a party to a proceeding or not. In relations to documents alleged to be forged which may be produced or given in evidence in any proceedings before a Court, the law requires that unless the Court lodges the complaint in the proper criminal Court the latter is incompetent to take cognizance of it. Admittedly such a complaint by the Court was not filed against the applicant. The Sub-Inspector's application dated 6th April 1926 to the District Court to file one under S. 476, Criminal P. C., was rejected by the presiding officer as per his order dated 7th April 1926 (Ex. P-43). The Magistrate has given the following reasons for holding that there is no need for a complaint by the Court :

(1) That the proceedings in the case under the Guardian and Wards Act terminated on 30th June 1925 when they were ordered to be filed, at least so far as the two accused Tularam and one more were concerned, and that they had no concern with the subsequent proceedings.

(2) That the will could not be said to have been produced or given in evidence within the meaning of the provisions of S. 195 (c), Criminal P. C., when the guardian produced it with his report dated 18th September 1925 without alleging that any offence of forgery was committed by anybody in relation of that document.

(3) That it could not be said to have been produced in the course of the proceedings since no matter was pending before the learned District Judge in which the will was required to be produced. That the proceedings were not judicial but of an administrative or executive character and no judicial decision was asked for in that report.

(4) That the District Judge did not at any stage of the judicial proceeding consider it as evidence nor was it alleged before him that it was a forgery.

Unfortunately for the minor, the District Judge Mr. Chatterjee, who started the proceedings upon the guardian's application and report dated 18th September 1925, did not remain attached to the Bhandara District Court, to know the result of the investigation, which he had, on the guardian's application, ordered to be made, through the agency of the Police Department with the concurrence of the District Magistrate, as he went

on leave on 2nd January 1926. To me it appears that he thought it inexpedient to authorise the guardian to initiate criminal proceedings all at once, without satisfying himself as to the certainty of the conviction of the person concerned and therefore selected the agency of the police investigation department to get out the truth, before commencing any prosecution against any individual person. He was right in proceeding cautiously in this manner. The aforesaid District Judge who is an officer of long standing and experience could reasonably be credited with sufficient knowledge of the provisions of Ss. 195 (c) and 476 and the requirements of the Criminal Law which prescribe a complaint by Court for initiation of a prosecution in such case. I can therefore confidently presume that he was awaiting the report of the police in order to issue notices to the applicant and others to show cause why they should not be prosecuted, and after making such formal enquiry before himself as might enable him to lodge the necessary complaint, he would certainly have sent the complaint to the First Class Magistrate as required by law; the investigation not having been completed in his time he could not do so and in the meantime he went on leave.

There was thus a failure to observe the necessary procedure and this gave the accused person an opportunity to raise an objection to the legality of the prosecution lodged directly by the Sub-Inspector on 22nd March 1926. He no doubt tried to mend matters and moved the successor of Mr. Chatterjee on 6th April 1926 to lodge the complaint, but the latter officer summarily rejected the petition by his order dated 7th April 1926, (Ex. P-43). The reasoning on which the Magistrate based his orders dated 8th June 1926 and 25th June 1926, is practically the one used by the District Judge in his aforesaid order. I am constrained to say that the reasoning is faulty and cannot be upheld. The decision of this question depends upon the right construction of S. 195 (c), Criminal P. C. It must therefore be ascertained whether the offence of the alleged forgery of the will dated 16th October 1923 could be said to have been committed by a party to any proceeding in any Court in respect of a document pro-

duced or given in evidence in such proceeding, so as to necessitate a complaint by the Court as required by S. 195 (c), Criminal P. C. The offence being one under S. 467, Indian Penal Code, comes within the purview of S. 195(c), Criminal P. C., but in order to apply its provisions strictly to a document alleged to be forged the said document must be 'produced' or 'given in evidence' in a 'proceeding' in a 'Court'.

The learned Magistrate was entirely wrong in thinking that the proceedings in the case under the Guardian and Wards Act terminated on 30th June 1925, so far as the applicant Tularam and another were concerned, and that they had no concern with the subsequent proceedings. If he meant to say that a proceeding in order to be a 'proceeding' must be between two parties actually appearing or cited before the Court, then certainly the proceedings after 30th June 1925, could not be called inter partes proceedings. It seems he has misconceived the whole scheme underlying the Guardian and Wards Act. The proceeding once initiated by an application either for appointment or for a declaration of a guardian last or continue throughout the minority of the minor concerned. The Crown is the guardian general of all minors but the statute has delegated the authority of the Crown to the District Court. The application for appointment or declaration is only the initial stage which the statute law prescribes as a condition for invoking this special jurisdiction of the District Court. Once it is invoked it becomes fastened on the estate of the minor and vests the powers of management etc. in the Court and it is only by a process of delegation of powers that some of those powers and functions of the District Court in the matter of the administration of the particular minor's estate become transferred, as it were, to the particular individual whom the Court selects to act on its behalf as its delegate subject to its own general superintendence and control. The Court does not cease to exercise its jurisdiction by merely handing over the certificate of guardianship to the person appointed or declared by it as the guardian of the property of the minor. The jurisdiction once invoked must therefore continue to be exercisable by the Court ordinarily, until the minor

attains majority, in respect of every matter relating to the management or administration etc., of the property of the ward. The main responsibility in all matters concerning the minor's estate rest on the Court and it is therefore provided in S. 33 of the Act that the guardian should apply to it for its opinion, advice or direction on any present question respecting such management or administration. It was with advertence to such provisions that the District Judge gave directions, in his order dated 18th June 1925, and endorsed on the certificate that his permission and sanction should be obtained by the guardian, for taking legal steps, against any individual, or, in respect of his subsequent dealings with the minor's estate. Even a cursory perusal of Ss. 33, 34, 40 and 42 of the Act could have made the thing clearer to the Magistrate. This Court's Civil Circular No. II-10 distinctly ordains that the filing of the papers of a case under the Guardian and Wards Act is only 'for statistical purposes'. It could never have been the intention, of such a provision for filing the papers, to put an end to the proceedings. He was therefore wrong in assuming that the proceedings had terminated on 30th June 1925. Nor is it correct to urge that, simply because the applicant was not cited to appear before the Court, after the date of appointment of the guardian, he ceased to be a party to the case, for purposes of any subsequent proceedings, which may bring to light, his concern with the estate, and which the Court, suo motu, or on the guardian's application, start, against him, or any other person having such a concern, if it conflicts with the due administration and management of the estate by the said guardian.

The learned Standing Counsel did not support the reasoning of the Magistrate that the proceedings must be 'pending', but only tried to maintain that the proceeding must be inter partes and not be of an administrative or executive character, and therefore contended that the document in question could not be said to have been 'produced' in 'Court' as it was admittedly filed merely as an annexure to the guardian's report dated 18th September 1925, and consequently there was no need of a complaint by the District Court. Reliance is placed by him on *Munisamy Mudaliar v. Rajaratnam*

Pillai (1) in support of his contention. On behalf of the applicant reliance is, however, placed on *Nalini Kant v. Anukul Chandra* (2), *In re Bhau Vyankatesh* (3) and *Emperor v. Gulabchand Rupji* (4). I have gone through the cases cited before me as also several other cases bearing on the point. After having given my best thought to these questions and also to the question whether the absence of a complaint in writing by a Court is an illegality not covered by S. 537, Criminal P. C., I have come to the following conclusions :

(i) that the document which is alleged to be forged 'produced' in a proceeding in the District Court which still retained its seisin over the case instituted under the provisions of the Guardians and Wards Act, and

(ii) that the present prosecution started without a complaint in writing by that Court is illegal and void in view of the imperative provisions of S. 195 (c) read in conjunction with the express provisions of S. 476, and the important omission of Cl. (b) of S. 537, Criminal P. C.

The word 'produced' was introduced in the section by the Criminal P. C., of 1898 with a set purpose, to give the Courts a larger jurisdiction to regulate the institution of criminal proceedings, against parties, or, other persons, who may be concerned with the commission of offences, in connexion with documents, not only 'giving in evidence,' but 'produced' in the course of any proceedings before him. It is not at all necessary that the proceedings must be 'pending' before the Court from before. I go further and say that they may even be commenced by the very act of production of the forged document itself before it. In a case reported in *Akhil Chandra Dev. Queen-Empress* (5), a certain document was filed as an annexure to a petition in a suit. The Munsiff on suspecting that it was tampered with held an enquiry and committed the petitioner for trial in the Court of Sessions. It was held that it was a proper commitment. This shows that the mere filing of a forged document as an annexure to a petition is a sufficient production of the document in Court. I think that the case of *Munisamy Mudaliar v. Rajaratnam Pillai* (1),

- (1) A. I. R. 1922 Mad. 495 and A. I. R. 1923 Mad. 136=45 Mad. 928 (F. B.).
- (2) [1917] 44 Cal. 1002=25 C. L. J. 255=39 I. C. 490=21 C. W. N. 640.
- (3) A. I. R. 1925 Bom. 433=49 Bom. 608.
- (4) A. I. R. 1925 Bom. 467=49 Bom. 799.
- (5) [1895] 22 Cal. 1004.

is easily distinguishable from, and has no analogy to the present case. On the contrary, cases relied on by the applicant support his contention as to the meaning of the word 'produced' as used in S. 195 (c), Criminal P. C.

As pointed out above, the evident object, of the minor's mother, in getting the several persons including the applicant joined as non-applicants in the guardianship case, and, of the guardian in submitting his own report, was to bring the several acts of misappropriation of the minor's property, to the notice of the District Court, with a view to its taking the necessary legal steps against them, or such of them, as it thought fit. The first step, taken towards that end, was to secure the appointment of a fit and proper person to administer the estate who will act under the advice, orders and direction of the Court. The next step was to apprise the Court of what, the guardian, according to his own lights, thought was the real situation of affairs, which he desired the Court, to consider, for itself, after getting the matter duly investigated through the Police Department. This was clearly a step preliminary to the further stage of taking legal steps and initiating prosecutions, and suits, against the individual culprits, or persons liable to make good the loss to the minor's estate, as to whose guilt, conviction, or, liability, the Court would have had to first satisfy itself with the help of the report of the investigating officer. If what the guardian purported to allege, namely, that the document was produced and handed over by the applicant to him as evidence of an alleged authority given to him by the deceased Vithoba to administer the estate as one of the trustees, be true, and he in his turn 'produced' it, in Court, with his report and petition, I venture to think that the process of production in Court became complete, and the document came into what is called *custodia legis* of the Court concerned. I have, therefore, no hesitation in holding it to be 'produced' in the course of a proceeding in the District Court, for purposes S. 195 (c) of the Criminal P. C.

For reasons already given, I am not prepared to hold that the District Court was only acting in an administrative or executive capacity, and not as a Court, when it received the petition and report

to which the Will was annexed. I say the District Judge was then acting as a Court. This distinction is shown in *Panchalu Reddi v. Chinna Venkata Reddy* (6) which commends itself to me. In *Beardsell & Co. v. Abdul Gani Sahib* (7), the document was produced before an official receiver in an insolvency case, and it was then produced in Court by him. Even on such production it was held, that the sanction of the Court and not of the official assignee was necessary. This furnishes a fitting analogy to the present case.

Lastly I may point that in view of the imperative requirements of the law as enacted in S. 195 (c) read in conjunction with S. 476 of the Criminal P. C., (as newly amended), the absence of a complaint in writing by the District Court has ceased to be a mere irregularity covered by S. 537 of the said Code by reason of the deletion of Cl. (b) of that section. That it is an illegality which vitiates the trial of the case by the Magistrate is clear from S. 530 (p) of the Code : cf *Janki Prasad v. Emperor* (8).

I am, therefore, of opinion that without a complaint in writing by the District Court, Bhandara, the prosecution could not have been started. The proceedings are, therefore, quashed as illegal and void.

G.B.

Proceedings quashed.

(6) [1918] 42 Mad. 96=35 M. L. J. 686=9 L. W. 237=48 I. C. 890=(1918) M. W. N. 903.

(7) [1912] 37 Mad. 107=14 I. C. 593=(1912) M. W. N. 536.

(8) A. I. R. 1926 All. 700.

* A. I. R. 1927 Nagpur 189.

HALLIFAX, A. J. C.

Local Government—Applicant.

v.

Gambhir Bhujua—Opposite Party.

Misc. Petition No. 49 of 1926, Decided on 9th September 1926, for sanction to prosecute.

(a) *Penal Code, S. 193—Contradictory statements in same deposition—Conviction for perjury on one or the other of the two statements cannot be had.*

If a witness makes a statement and later in the course of the same deposition contradicts it and says it was untrue, the whole deposition amounts to no more than the second statement.

He cannot be convicted of perjury in the alternative, in one or the other of the two statements, and if the first can be proved to be false he cannot be convicted of more than attempt to commit perjury. [P 191, C 1]

*(b) *Criminal P. C., S. 339 (3)—Sanction.*

Before sanction can be granted it must be shown that there is no intention of prosecuting the approver for the original crime, or that he has already been prosecuted for it and either has been acquitted or has received or is likely to receive such a light sentence that it is not sufficient to cover his further crime of perjury. [P 191, C 1, 2]

(c) *Criminal P. C., S. 339 (1)—S. 339 (1) does not cancel Criminal P. C., S. 476.*

Section 339 (1) does not cancel S. 476. It merely imposes an additional condition as essential to the institution of a prosecution for perjury by an approver, and even when that condition is satisfied the prosecution can still be initiated only on a complaint by the Sessions Court or the High Court. [P 192, C 1]

G. P. Dick—for the Crown.

Halifax, A. J. C.—The Local Government has applied under S. 339 (3) of the Criminal Procedure Code for the sanction of this Court to the prosecution of one Gambhir Bhujua for the offence of giving false evidence in respect of a statement made by him after acceptance of a conditional tender of a pardon made under S. 337 of the Code.

The facts are these. Gambhir and two other men were arrested on an accusation of having murdered one Munna Teli, and put before a Magistrate on the 24th of September 1925. On that day the Magistrate offered Gambhir a pardon according to the provisions of S. 337 of the Criminal Procedure Code. He accepted the offer and was immediately examined as a witness, but denied at considerable length that he knew anything about the murder under enquiry. Subsequently a written petition signed by him was put before the Magistrate saying that he wished to give a full and true account of the murder of Munna Teli and, for that purpose, to be examined again. He was accordingly examined again on the 15th of October and then gave an account of the murder which agrees with the account given by the prosecution and subsequently found to be true in the Sessions Court at the trial of the other two men.

Gambhir was again examined by the Magistrate on the 24th of October about a minor detail of the occurrence and made a statement which seems to be in accordance with his full account of the

offence given on the 15th of that month. He was again put into the witness-box on the 2nd November, apparently to be questioned about another minor fact appearing in the evidence of some other witness but not mentioned by him, which he was expected to corroborate. He however denied the fact and added:

Whatever statement I had given on the previous occasion is false, as it was given at the instance of the Court Inspector.

The other two accused were committed for trial on the 11th of November. On the following day Gambhir sent a written petition to the Magistrate, which is on the file of the Sessions Court, saying that on the 15th of October the Court Inspector had sent for him and given him something to smoke which intoxicated him, and had told him something which he had repeated in Court, being then still under the influence of the drug, but it was not true and his earlier statement was. He was examined on the 11th of December in the Sessions Court as a witness in the trial of the other two men, and again at great length denied that he knew anything about the murder, with explanations or denials of what he was alleged to have said and done in connexion with the offence and during the investigation by the police.

In the judgment of the Sessions Court delivered on the 14th of December it was found that the two accused had committed the murder along with Gambhir in the circumstances set out in his deposition of the 15th of October, and each of them was sentenced to transportation for life. Neither of them has appealed and no appeal is now possible. On the 3rd of June 1926 the Public Prosecutor gave the certificate required by S. 339 (1) of the Criminal Procedure Code to enable Gambhir to be tried for the murder of Munna Teli or any other offence committed by him in connexion with the same matter.

These facts are briefly set out in the application made to this Court, and it is prayed that "sanction be granted accordingly for prosecuting Gambhir for giving false evidence". That is far from a sufficient description of the offence with which it is proposed to charge Gambhir; what that is seems to be left to this Court to discover. The learned Government Advocate at first amplified the pro-

posed charge into an alternative charge of perjury on one of two occasions, either in the committal proceedings or in the Sessions Court. That is impossible as there is no contradiction between the two depositions. If a witness makes a statement and later in the course of the same deposition contradicts it and says it was untrue, the whole deposition amounts to no more than the second statement. He cannot be convicted of perjury in the alternative, in one or the other of the two statements, and if the first can be proved to be false he cannot be convicted of more than an attempt to commit perjury.

It might perhaps be possible to hold that Gambhir did not withdraw his statement of the 15th of October in the course of the same deposition, as the withdrawal was made at his later appearances in the witness-box, so that he can be proved guilty of perjury on one occasion or the other by the mere contradiction between his statement of the 15th of October and that in the Sessions Court. That however is hardly possible, and anyhow resort to the expedient of an alternative charge is only justified when it is difficult to establish the falsity of one of the two statements. There appears to be no difficulty of that kind here. If, therefore, Gambhir is to be charged with perjury it must be in respect of his statement in the Sessions Court alone.

The reasons for which a High Court should grant or refuse sanction to the prosecution of a pardoned approver for perjury seem to be indicated with fair certainty by the fact of the sanction being necessary in that case only. It is clearly not necessary that such a person should be punished for perjury if he can be punished sufficiently both for that and the original crime on a conviction for that original crime. Sanction therefore ought to be refused unless it appears that a conviction for the original crime is unlikely or a prosecution for it undesirable for any other reason, or that on a conviction for the original crime the sentence that could be passed would be too light to cover both offences. Before sanction can be granted therefore, it must be shown that there is no intention of prosecuting the approver for the original crime, or that he has already been prosecuted for it and either has been acquitted or has received or is likely to receive

such a light sentence that it is not sufficient to cover his further crime of perjury.

None of these reasons for granting sanction exists in the present case. The evidence to prove Gambhir guilty of murder is even stronger than that on which the other two men were convicted as it includes his own statement of the 15th of October. Also it will be necessary to prove him guilty of murder before he can be convicted of perjury. If he is convicted of murder he must be sentenced to transportation for life at the least, and it will certainly not then be necessary to get any further sentence passed on him for perjury. There is also no intention, as I am given to understand, of abandoning the prosecution for murder, for which indeed the certificate of the Public Prosecutor required by S. 339 (1) of the Criminal Procedure Code has already been obtained.

The mention of that certificate in the application for sanction is an indication of the confusion of ideas which has led to the incompleteness of the presentation of the case for the Crown. On my request for information on the matters stated above as the only basis for the grant or refusal of sanction, copies were produced of a telegram and a letter from the District Magistrate to the Legal Remembrance in reply to a similar request from the latter. The learned Government Advocate stated that those were the only instructions he had.

According to the telegram, "action for prosecuting Gambhir for murder is deferred pending High Court's sanction" on the present application. This is amplified in the District Magistrate's letter, where he writes: "As the facts are complicated I thought it best to put all of them before a competent Magistrate with the certificate of the Public Prosecutor and the sanction of the High Court and leave it to him to determine whether Gambhir should be convicted of murder or of perjury or both . . . I have already explained the cause of the delay. I thought the other accused might file an appeal against conviction and if they were acquitted, it was no good prosecuting Gambhir for murder or for perjury."

These matters, put forward as the whole case for the grant of sanction, make its refusal inevitable. The facts seem somewhat less complicated than

those of most similar cases, but anyhow the two accusations, one of murder on the 8th of August 1925 and the other of perjury on the 11th of December, could not be laid before a Magistrate together, nor could he decide whether the conviction should be of one offence or the other or both. It may be mentioned also that the presentation of the two cases to a Magistrate together is made still more impossible by the difference in the ways they would have to be presented. The murder case would be a prosecution by the police on a chalan accompanied by the certificate of the Public Prosecutor. But S. 339 (1) of the Criminal Procedure Code does not cancel S. 476. It merely imposes an additional condition as essential to the institution of a prosecution for perjury by an approver, and even when that condition is satisfied the prosecution could still be initiated only on a complaint by the Sessions Court or this Court.

The application for sanction must be rejected as premature at the least. As has been said, it should be made only after it has been decided not to prosecute Gambhir for murder or that prosecution has failed. It may be mentioned that his acquittal for murder would not of itself be any bar to his conviction for perjury, as the last words of the letter quoted above indicate it would in the opinion of the District Magistrate. If the prosecution for murder which is admittedly to be instituted should fail, that failure would of itself be no reason why another application for sanction to prosecute Gambhir for perjury should not be made. The present application, however, is rejected.

R.D.

*Application rejected.***A. I. R. 1927 Nagpur 192**

FINDLAY, J. C.

Ramdutt Shankerlal—Defendant 1—Appellant.

v.

Punamchand and *another*—Defendant 2—Respondents.

Miscellaneous Appeal No. 20 of 1926, Decided on 28th January 1927, from the decree of the Dist. J., Nagpur, D/- 2nd February 1926, in Civil Appeal No. 154 of 1925.

Civil P. C., O. 41, R. 23—Appellate Court unable to dispose of suit on merits—Remand is necessary.

Where it is clearly apparent that the appellate Court cannot itself dispose of a suit on the merits by the adoption of the specific procedure mentioned in Rr. 24-29 of O. 41, a remand for retrial is not only permissible but obviously incumbent on the Court : 44 Cal. 929, *Foll.*

[P 192 C 2]

D. T. Mangalmoorti—for Appellant.

Judgment.—The facts of this case are sufficiently clear from the lower Courts' judgments. It has been urged on appeal that the case was improperly remanded under O. 41, R. 23 of the Civil P. C., inasmuch as the first Court had given decisions on all the essential issues: cf. *Jagannath v. Maruti* (1). The question of what is a preliminary point has been the subject of much judicial discussion and I have been referred in this connexion to the decision in *Ghuznavi v. The Allahabad Bank, Ltd.* (2). Even in that decision, however, Mookerjee, J., pointed out that where it is clearly apparent that the appellate Court cannot itself dispose of a suit on the merits by the adoption of the specific procedure mentioned in Rr. 24-29 of O. 41, Civil P. C., a remand for retrial is not only permissible but obviously incumbent on the Court. In the present case the learned District Judge has pointed out that the separation between Ramdatta and Surajmal is a matter which requires elucidation and that more detailed pleadings are required in connexion with this and kindred matters. He has also, in paras. 4 and 6 of his judgment, shown that various other matters required elucidation and possibly the production of fresh evidence. On the whole, therefore, I am of opinion that the remand was advisable in the circumstances of the case, even if in order to afford legal justification for the remand, recourse had to be had to the inherent powers of the Court under S. 151 of the Civil P. C.

I do not, therefore, think that in the present case it is necessary to interfere with the order of remand and I dismiss the present appeal without notice to the respondents.

G.B.

Appeal dismissed.

(1) [1916] 12 N. L. R. 126=36 I. C. 241.

(2) [1917] 44 Cal. 929=21 C. W. N. 877=41 I. C. 598=26 C. L. J. 49 (F.B.).

A. I. R. 1927 Nagpur 193

FINDLAY, J. C.

Paiku—Defendant—Appellant.

v.

Bhiwa—Plaintiff—Respondent.

Appeal No. 325 of 1925, Decided on 31st January 1927, from the decree of the Dist. J., Nagpur, D/- 28th April 1925.

Hindu Law—Widow—Surrender—Conveyance of small portion for widow's maintenance does not change nature of transaction from being acceleration—Limitation Act, Arts. 120 and 125.

The conveyance of a small portion of the surrendered land for maintenance to the widow is unobjectionable and does not alter the nature of the transaction which remains one of acceleration in favour of the next reversioner; and that being so, Art. 125 cannot apply, but Art. 120 is applicable; *A. I. R. 1919 P. C. 75* and *A. I. R. 1921 P. C. 107, Foll.*; 44 *Bom.* 255, not *Foll.* [P 194, C 2]

H. S. Gour and *M. B. Niyogi*—for Appellant.

B. K. Bose—for Respondent.

Judgment.—The plaintiff-respondent Bhiwa, filed the present suit in the Court of the Additional Subordinate Judge, 1st class, Kamptee, against the defendant-appellant, Paiku, as well as two other defendants Mt. Guji and Mt. Parbati, for a declaration that a deed of gift, dated 10-2-17 and a deed of sale, dated 26-5-21 (cf. copies of P. 10 and P. 9) are void and inoperative beyond the lifetime of Mt. Guji and are not binding on plaintiff. The property affected consists of absolute occupancy Nos. 65 and 90, occupancy fields Nos. 87 and 105 and a house in mouza Yesamba, Tahsil Ramtek, Nagpur. (Here pedigree is given). The property in question belonged to Bagal who died about 1909: he left two widows, Mt. Guji and Mt. Kalhi who was the mother of Mt. Tulsi, while plaintiff was Bagal's nephew. After Bagal's death, these widows inherited the property. Mt. Kalhi died in 1920, and thereupon, the subjects would have passed to Mt. Guji, but for a deed of gift executed on 10-2-17 by the widows in favour of Mt. Tulsi and her stepson Nago alias Doma, husband of Defendant 3, Mt. Parbati. Doma subsequently died and Mt. Tulsi on 26-5-21 sold the property in suit to the appellant. Since then, Mt. Tulsi has died and plaintiff accord-

ingly brought the present suit for a declaration that the gift and sale deeds specified are void and inoperative beyond the lifetime of Mt. Guji.

The suit proceeded *ex parte* against Mt. Guji and defendant Paiku was the main contestant. His case was that: (a) Bagal and plaintiff were not related as stated in the plaint. (b) Mt. Tulsi and Nago were in possession since the date of the gift, while he (Paiku) has been in possession since the sale in his favour. The cause of action arose on the date of the transfers and the suit is now barred by limitation. (c) In any event, plaintiff has no cause of action as regards the occupancy fields, these having been surrendered to the *malguzar* who let them out to appellant. (d) Plaintiff cannot challenge the transfer of the half portion which devolved on Mt. Parbati after Nago's death as plaintiff is not a reversionary heir of Mt. Tulsi. (e) Nago's interest in the holding is extinguished by the fact of appellant having held possession for over two years. (f) Nago was only the stepson of Mt. Tulsi and not her son and the registration of the gift deed was thus effected by fraud. The donees were, therefore, in the position of trespassers as against the widows and plaintiff and the title of plaintiff has become indefeasible by two years' adverse possession. (g) The gift deed, being in favour of the next heir, was, in effect, a surrender of the estate: the donees have thus become full owners. Mt. Parbati so far adopted the above pleadings and further urged that Doma was Mt. Tulsi's son: Mt. Parbati accordingly inherited Nago's half share in the property on his death and Mt. Tulsi could not, therefore, give a valid conveyance thereof to plaintiff.

On the issues framed on these and connected pleadings the Additional Subordinate Judge came to the following findings: (I) That plaintiff's family tree as given by him is correct. (II) That Nago was not Mt. Tulsi's son. (III) That the deed of gift is not binding on plaintiff, as being one in favour of the next heir Mt. Tulsi. (IV) That it is similarly not binding as a deed of relinquishment. (V) That Nago did not give rise to a fresh stock of descent and he never, as a matter of fact, took possession of the subjects. (VI) That the registration of the deed of gift was effected owing to

fraudulent recitals and is, therefore, invalid, defendants as a result being trespassers; and (VII) the suit is not time barred, Article 125 of the Limitation Act being applicable thereto. The Additional Subordinate Judge further held that, as there had been a surrender of the occupancy fields, this could not be challenged, but granted decree for declaration as craved for by plaintiff so far as the absolute occupancy fields and the house were concerned.

Paiku preferred an appeal to the Court of the District Judge, Nagpur, while the plaintiff-respondent in that Court preferred a cross objection so far as the disallowance of his claim to the occupancy fields was concerned. The appeal was dismissed, but as regards the cross-objection, the District Judge pointed out that the sale-deed (P. 9) did not cover the occupancy lands which were surrendered under the razinama, dated 26-5-21 (P. 11). No relief had been prayed for as regards this latter deed and the Judge of the lower appellate Court only granted him an additional relief giving him the declaration sought for regarding the occupancy land so far as the gift deed of 10-2-17 and sale deed of 26-5-21 were concerned.

The first defendant Paiku has now come up in second appeal to this Court. On the appeal coming on for hearing, counsel for respondent admitted that the relief granted to his client by the lower appellate Court was an improper one and could not stand. Counsels on either side were agreed that, in this connexion, the decree of the first Court should be restored dismissing the plaintiff's claim so far as the occupancy land is concerned and that this is correct is clear from the finding of fact arrived at by the District Judge, in paragraph 9 of his judgment. I am, therefore, now only concerned with the absolute occupancy land and house in suit.

The Additional Subordinate Judge, in paragraph 10 of his judgment, held that the deed of 10-2-17 by Mt. Guji and Mt. Kalhi in favour of Mt. Tulsi and Nago was a pure deed of gift and not a relinquishment of tenancy rights. The donors reserved their right of maintenance and of residence in a house. Mt. Guji's name remained in the khasra up to 1921 and there was also proof that she managed the land on behalf of

Mt. Tulsi. The lower appellate Court held that it was not necessary for the plaintiff to allege that the transfer challenged was binding and valid during the lifetime of the transferor in order to make Art. 125 of the First Schedule of Limitation Act applicable. *Adivappa v. Toutappa* (1) was also relied on in support of the proposition that the gift was an alienation and not a mere acceleration. Macleod, C. J., and Heaton, J., pointed out in the case quoted that if there is any consideration by the widow for the gift of her life estate, the existence of such consideration necessarily changes the nature of the transaction from an acceleration into an alienation. The learned District Judge, however, failed to notice that their Lordships of the Privy Council have meanwhile laid down the contrary principle in *Bhagwat Koer v. Dhanukdhari Prashad Singh* (2) and *Sureshwar Misser v. Maheshrani Misrani* (3). In the latter case their Lordships pointed out that the conveyance of a small portion of the surrendered land for maintenance to the widow was unobjectionable and did not alter the nature of the transaction which remained one of acceleration in favour of the next reversioner.

This being so, it seems to me that Art. 125 cannot apply, because we are not dealing with an alienation. It follows that Art. 120 is applicable; the surrender or relinquishment took place on 10-2-17; the present suit was filed on 11-10-23 and it follows that the six years' limitation had already then expired so far as the gift deed was concerned.

The learned counsel for the respondent has, however, in effect admitted that he does not now desire to impeach the gift deed of 10-2-17. What he desires to impeach is the sale deed of 26-5-21 in plaintiff's favour and even applying Art. 120, the suit would, he alleges, still be in time so far as the sale deed is concerned. Mt. Tulsi was also, it is urged, a limited taker, but plaintiff can only bring a declaratory suit so long as Mt. Guji is alive, for she as Baga's heir would come in again

(1) [1920] 44 Bom. 255=55 I. C. 369=22 Bom. L. R. 94.

(2) A. I. R. 1919 P. C. 75=47 Cal. 466=46 I. A. 259 (P. C.).

(3) A. I. R. 1921 P. C. 107=48 Cal. 100.

It has been urged further that even admitting Mt. Guji to be the next reversioner she has placed herself in such a position that she cannot sue and that in the circumstances plaintiff was entitled to bring the present suit: cf. Mayne's Hindu Law, 9th edition, para. 646, and *Fateh Singh v. Jagannath Bakhsh Singh* (4). This is a matter in which the lower appellate Court will probably find it advisable to take further pleadings from the parties. This aspect of the case has met with no attention in the lower appellate Court and it is obvious that the whole suit has now acquired an entirely new aspect in view of the mistake made by the District Judge in following *Adivappa v. Toutappa* (1) and of the now admitted fact that we are now no longer concerned with the occupancy land and that even as regards the remaining subjects, the gift deed of 10-2-17 per se cannot be impeached now. As regards the sale deed of 25-5-21 an entirely different set of facts and of legal considerations arise and I am of opinion that, in the circumstances, the appeal in the District Judge's Court should be reheard, in the light of the above remarks. The judgment and decree appealed against are reversed and the case is remanded to the Court of the District Judge for retrial of Appeal No. 41 of 1925 on the merits with advertence to the above remarks. Costs incurred in this Court will follow the event. There will be no certificate of refund of Court-fees.

R.D.

Case remanded.

(4) A. I. R. 1925 P. C. 55=47 All. 158.

A. I. R. 1927 Nagpur 195

FINDLAY, J. C.

D. Rozario—Defendant—Appellant.

v.

Hariballabh Onkarjee Trivedi—Plaintiff—Non-Applicant.

Civil Revision No. 189 of 1926, Decided on 7th February 1927, from the decree of the Small Cause Court J., Nagpur, D/- 23rd March 1926, in Small Cause Suit No. 2342 of 1925.

(a) *Stamp Act, S. 2 (5) and (22)*—Promissory note or bond.

A document not payable to order or bearer and attested by a witness is a bond and not a promissory note.

[P 195 C 2]

(b) *Evidence Act, S. 92, Prov. (2)* — Bond silent about interest—Oral evidence to prove separate agreement for interest is admissible.

When a bond is silent about interest evidence is permissible to prove a separate agreement to pay interest, but very satisfactory and strong evidence is essential in order to establish any such separate agreement.

[P 195 C 2]

S. K. Ghosh—for Appellant.

Order.—The first point in this case is whether the instrument (P. 1) is a bond or a promissory note as defined in S. 2, Cls. (5) and (22) respectively, of the Indian Stamp Act. Undoubtedly, the instrument in question would have been a promissory note but for the fact that it was attested by a witness. The note in question is not payable to order or bearer, and, in those circumstances, I think the lower Court was correct in treating it as a bond.

The next question is whether, in spite of the silence of the bond as to interest, there was any agreement to pay interest at Rs. 2 per cent per mensem.

I so far agree with the lower Court that oral evidence was permissible under S. 92, proviso (2), Evidence Act, to prove a separate agreement as regards interest, but I am not satisfied with the evidence produced on this point in the present case. In a document like the present, where no mention of interest is made, very satisfactory and strong evidence is, in my opinion, essential in order to establish any such separate agreement as is alleged to have been arrived at orally in the present case. It is significant that Naidu, the attesting witness, says that Rs. 50 prospective interest was already included in the bond and that no other agreement reinterest was come to. Of the two witnesses who support the plaintiff, one is a fellow-Railway servant and presumably in a position subordinate to the plaintiff, and I am not satisfied, on the evidence of Jagannath (P. W. 3), as to the genuineness of the plaintiff's claim in this connexion. I, therefore, decline to allow interest in the present case.

On a third point, however, I find it necessary to remand the case to the lower appellate Court. I saw cause to admit in this Court a memorandum (A.1) professing to come from the plaintiff-non-applicant to the defendant-applicant, dated 11th August (year not stated) asking for payment of certain money. This letter, it is alleged on behalf of the

applicant, shows that the debt in suit was repayable by instalments. On the other hand, the plaintiff non-applicant has filed an affidavit to the effect that this letter relates to a previous loan of Rs. 10 taken in the year 1922; the non-applicant's statement in this connexion has been recorded by me and, on the other hand, the applicant has sworn before me that he never took any such loan of Rs. 40 in 1922 or in any other year. This is a matter which, in my opinion, should be elucidated by taking further pleadings and, if necessary, evidence in the lower Court and I remand the case to that Court for a finding on the following issue:—

Did the applicant Rozario take a loan of Rs. 40 from the non-applicant Hariballabh Onkarjee Trivedi in 1922 or in any other year and, if so, does the memorandum (N. P. 1) refer to the said loan of Rs. 40 or to the loan evidenced by P. 1?

The lower Court will take what further pleadings and evidence may be necessary on this issue and will submit its finding to this Court by 11th April 1927. Thereafter, 15 days will be allowed for filing of objections thereto and the case will be finally heard on 27th April 1927. Costs will abide the result.

G.B.

Case remanded.

A. I. R. 1927 Nagpur 196

HALLIFAX, A. J. C.

Yadorao and another—Plaintiffs—Appellants.

v.

Chandudas and another—Defendants—Respondents.

Second Appeal No. 8 of 1926, Decided on 3rd February 1927, from the decree of the Dist. J., Raipur, D/- 18th September 1925, in Civil Appeal No. 35 of 1925.

(a) *Contract Act, S. 68—Contract by mother—Minor is not liable—If money under the contract is spent for necessities for him, he is liable.*

A minor is not liable at all on the contract of loan made by his mother, but he is liable under the contract for any sum of money spent on procuring necessities for him under S. 68, Contract Act. [P 196 C 2]

(b) *Civil P. C., O. 41, R. 33—Respondent absent—Decree may be varied in his favour.*

Even in the absence of a respondent an appellate Court has the power to vary the decree in his favour. [P 197 C 1]

G. R. Deo—for Appellants.

P. N. Rudra—for Respondents.

Judgment.—The learned District Judge has held that the plaintiffs have failed to prove that the sum of Rs. 600 was used in payment for necessities supplied to the minor for his marriage. That finding is based upon the fact that it is not even asserted in the evidence that more than Rs. 200 or Rs. 250 was so spent. But there has been no examination of the question whether any less amount than Rs. 600 was so spent. The minor is not liable at all on the contract made by his mother, but he is liable for any sum of money spent on procuring necessities for him. The liability is based on the authority of S. 68 of the Contract Act, and not, as the learned Judge has said,

on the authority of the decisions reported in 2 Nag. L. R. page 25 and 13 Nag. L. R. page 109.

Now a sum which Prayagdas (1 D. W. 9) calls one of "Rs. 200 or Rs. 250" has very clearly been proved to have been paid to him for articles already supplied by him and his son Bhunashwardas for the minor's marriage to the daughter of Bhuneshwardas. Prayagdas does say that the price of these things has never yet been paid, but that is obviously untrue. His son Bhuneshwardas not long afterwards took over charge of the minor's property, which is considerable, and avoided going into the witness box; it was more convenient to send his father there, though he himself was the person concerned in the matter, with which his father had little to do. The vagueness of the statement of the amount, which is a refusal to state it definitely, is a further indication of the untruthfulness of the witness, and also of the amount having been much greater.

But a denial by a witness that a sum of money was paid cannot be called evidence that it was, even if the denial appears untrue. There is however direct evidence of the payment in the deposition of Thakur Ram (P. W. 8), which is strongly corroborated by all the other facts of the case. In regard to the amount there is no evidence beyond the statement of Prayagdas, and his grudging admission of "Rs. 200 or Rs. 250" is good proof that it was not less than Rs. 250. I find accordingly that a sum of Rs. 250 was advanced by the plaintiffs for payment for necessities suited to the

minor's condition in life which had already been purchased, which is the same as supplying him with them.

The interest which Budhia Bai agreed to pay in the bond was at the rate of $13\frac{1}{2}$ per cent per annum or as it is commonly called, "eighteen annas a month." But the interest to be awarded is not on the contract, which is void, but as damages at a fair rate. The rate of $13\frac{1}{2}$ per cent is certainly a very reasonable rate, and that is further proved by the fact that it is the rate which Budhia Bai and Purandas were willing to pay and agreed to pay in the bond they executed. The respondent Chandudas is therefore liable to pay to the plaintiffs the sum of Rs. 250 with compound interest thereon at $13\frac{1}{2}$ per cent per annum from the 19th of May 1920 to the 21st of April 1925, that is Rs. 466-6-0.

By inadvertence, of which the least to be said is that it is regrettable, the learned District Judge has entirely ignored the claim made against the second defendant Purandas and decreed against his son Dugnudas, who was made a defendant in his place when he died not long after the suit was instituted. The decree of the first Court ordered the payment of Rs. 969-1-6 and Rs. 205-7-3 for costs, with interest on both sums at 6 per cent per annum from the 21st of April 1925 till the date of payment, by both Chandudas and Dugnudas, the liability of the latter being limited to the extent of the assets of his father Purandas in his hands. Chandudas alone appealed making Dugnudas a respondent and Dugnudas did not put in any appearance.

Even in the absence of a respondent an appellate Court apparently has the power, under R. 33 of O. 41, to vary the decree in his favour, but the learned Judge did not even purport to act under that rule. He examined the liability of Chandudas alone, and finding that he was not liable set aside the whole decree and dismissed the suit. I have myself considered whether the decree of the first Court against Dugnudas ought to be altered, under R. 33 of O. 41, because of the result of the claim against Chandudas, and I can find no reason for doing so.

The decree of the lower appellate Court will accordingly be set aside. In its place a decree will issue ordering the defendant Dugnudas to pay to the

plaintiffs the sum of Rs. 969-1-6, out of which the defendant Chandudas shall be liable, severally and jointly with Dugnudas, for Rs. 466-6-0, with interest at 6 per cent per annum from the 25th of April 1925 till the date of payment. The liability of Dugnudas will be limited to the extent of the assets of his father Purandas in his hands.

The considerations indicating the proper order in respect of costs are that the sum of Rs. 600 was advanced in good faith for the minor's marriage, and the whole of it was almost certainly expended for that purpose, though the defence has succeeded in preventing the plaintiffs from proving directly that more than Rs. 250 was so spent, and further that the plaintiffs' costs were not much in excess of what they would have had to spend on a claim of Rs. 250 with interest.

It will accordingly be ordered that the two defendants shall pay the whole of the costs of the plaintiffs in the first Court and in this Court, and the defendant Chandudas shall pay those in the lower appellate Court. The amount of costs in each Court will carry interest at 6 per cent per annum from the date of the decree of that Court. The pleader's fee in this Court will be fifty rupees.

G.B.

Decree set aside.

A. I. R. 1927 Nagpur 197

PRIDEAUX, A. J. C.

Sabuddin and others—Applicants.

v.

Pundlik and others—Non-Applicants.

Miscellaneous Judicial Application No. 31-B of 1926, Decided on 8th November 1926, from the decision of the 1st Class Sub-J., No. 1, Akola, D/- 31st August 1925, in Civil Suit No. 50 of 1921.

(a) *Limitation Act, S. 5—Application to appeal in forma pauperis—Delay cannot be condoned.*

Delay in filing an application to appeal in forma pauperis cannot be condoned under S. 5 : 30 Cal. 790, *Foll.* [P 198 C 1]

(b) *Civil P. C., S. 151—Other remedy open, but not availed of—S. 151 cannot be invoked.*

Section 151 cannot be invoked where the party had a remedy in law and failed to take advantage of the same within limitation : A. I. R. 1926 Mad. 258, *Foll.* [P 198 C 1]

Rafuddin Ahmad—for Applicants.

G. G. Hatvalne—for Non-Applicants.

Order.—The present application to appeal in forma pauperis is time-barred, and if I could entertain it, there has been great—and it seems to me unjustifiable—delay between my order of the 23rd April 1926 and the actual filing of the application which was not filed until the 4th of September. There is authority to show that delay in these cases cannot be condoned under S. 5 of the Limitation Act : see *Sarat Chandra Dey v. Brojeswari Dassi* (1), and as regards S. 151 of the Civil Procedure Code, the law apparently is that this section cannot be invoked where the party had a remedy in law and failed to take advantage of the same within limitation : see *Vadapalli Varadacharlu v. Khanavilli Narasimha Chary* A. I. R. 1926 Madras 258 and *Duni Chand-Gokal Chand v. Pritam Das* (2). I decline to grant the application to sue as a pauper, and give the appellants one month's time from to-day to make good the deficient Court fees.

G.B. *Application disallowed.*

(1) [1903] 30 Cal. 790 = 8 C. W. N. 906.

(2) A. I. R. 1925 Lah. 321.

A. I. R. 1927 Nagpur 198

MACNAIR, A. J. C.

Baldeo Prasad—Appellant.

v.

Kusam Singh—Respondent.

Second Appeal No. 61 of 1927, Decided on 1st February 1927, against the order of the Addl. Dist. J., Jubbulpore, D/-22nd July 1926, in Misc. Judl. Case No. 8 of 1925.

Execution sale—Sale after death of guardian ad litem is not a nullity—Civil P. C., O. 32, R. 11.

A sale held in execution of a decree after the death of the guardian ad litem of a minor judgment-debtor without appointing a fresh guardian is not a nullity : A. I. R. 1924 Mad. 130, *Rel. on* ; 23 Cal. 686, *Foll.* [P 199 C 1]

V. Bose and P. N. Rudra—for Appellant.

S. K. Ghosh—for Respondent.

Judgment.—The question whether a second appeal lies has been argued before me, and for the sake of convenience I refer to the parties as appellants and respondents.

My predecessor directed that the petition to this Court should be treated as an application for revision, but this order was made without hearing the appellants, and it is open to me to reconsider it. The appellants were decree-holders in the first Court; the respondents Nos. 1 to 4 were judgment-debtors. Their property was advertised for sale in execution of a decree and was sold to Respondent No. 5 on 30th March 1925; the sale was confirmed on 19th June 1925. The judgment-debtors applied for setting aside the sale on 11th July 1925, putting forward a number of grounds. The learned Judge of the first Court held that this application was barred by limitation. The lower appellate Court held that there was one ground with respect to which Art. 166 of the Limitation Act did not apply as the question raised was not one that falls under O. 22, Civil P. C. This ground is that the guardian of the minor judgment-debtors died on 14th March 1922 and therefore the sale was a nullity. The Judge remarked that the judgment-debtors' application should be entertained under S. 47, Civil P. C., and was therefore governed by Art. 181 of the Limitation Act. The appeal was allowed and the case was sent back to the first Court for a fresh decision.

The lower appellate Court, therefore treated the appeal as one against an order under S. 47, Civil P. C. The petition to this Court must be treated as one against an appellate order under S. 47, Civil P. C. An appeal lies against such an order. The petition, then must be treated as a Second Appeal. I add that the respondents have made no objection to the petition being so treated.

I have now to consider whether the sale was a nullity. The learned counsel for the appellants relies on *Doraswami v. Chidambaram Pillai* (1). In that case the judgment-debtor died after the proclamation of sale, and his legal representatives were not brought on record before the sale actually took place. It was held that the sale was not a nullity. It seems clear that if this decision is good law, the appeal must succeed. In *Net Lall Sahoo v. Sheikh Kareem Bux* (2) the facts agreed even more exactly with the facts

(1) A. I. R. 1924 Mad. 130 = 47 Mad. 63.

(2) [1896] 23 Cal. 686.

of the case I am considering. The sale was held after the death of guardian ad litem of a minor defendant without appointment of a fresh guardian. It was held that the absence of a guardian ad litem did not affect the validity of the proceedings.

I can see no reason for disagreeing with the authorities cited. No decision to the contrary has been pointed out to me. As remarked by Krishnan, J., in *Doraswami v. Chidambaram Pillai* (1), the view taken by the lower appellate Court introduces a most serious uncertainty into Court sales. The decree-holders did all that the law required them to do, and the death of the guardian does not invalidate the actual sale.

The appeal, therefore, succeeds. The lower appellate Court has already held that the appeal before that Court was barred by time unless the execution sale was an absolute nullity. This finding is not attacked before me. I, therefore, direct that the finding of the lower appellate Court be set aside and that the appeal before that Court be dismissed. Costs in both Courts should be borne by Respondents Nos. 1 to 4 in this Court.

R.D.

Appeal allowed.

A. I. R. 1927 Nagpur 199

HALLIFAX, A. J. C.

Sidhgopal—Plaintiff—Appellant.

v.

Tara—Defendant—Respondent.

Second appeal No. 129 of 1926, Decided on 18th January 1927.

Landlord and tenant—Right to graze cattle.

A person who is a tenant in one mahal of a village cannot claim to graze his cattle in the waste land in another mahal of that village,

[P 200 C 1]

*A. Bhagwant and S. A. Ghadge—*for Appellant.

*V. R. Dhoke—*for Respondent.

Judgment.—The plaintiff claimed payment for the defendant's cattle having grazed in his malguzari jangal, and much time was wasted over the futile and disingenuous plea that there was no jangal in the village, but only banjar. There was never any question about the

land to which the claim referred, and indeed it seems that it could be properly described neither as jangal nor banjar but as bir.

The claim against the respondent, Tara Teli, was in respect of twenty head of cattle that had grazed on the plaintiff's land, each in one year of the last three. For this the plaintiff claimed one rupee a head, and the defendant admitted the rate to be correct but denied that any cattle of his ever grazed on the plaintiff's land. The plaintiff further claimed Rs. 3-8-0 for each of the defendant's cattle which had been put in his kotha at night, and as he alleged, supplied with grass by him. The total of the sums claimed was Rs. 90.

The plaintiff filed another suit against one Munnial which is precisely the same in all respects except that the number of the cattle is sixteen, and the total claimed is Rs. 72. The suits were dismissed in the first Court, and the plaintiff's appeals to the Court of the District Judge were also dismissed. He has filed two appeals in this Court, and that in the suit against Munnial (S. A. No. 130 of 1926) will be considered along with that in the suit against Tara Teli.

The findings of both the Courts below are these: The defendants' cattle did graze on the plaintiff's land, but only for a portion of the year, after the grass on that land had been cut and sold.

Such grazing is ordinary village nistar and no grazing dues should be charged for it.

There was no agreement that fodder should be supplied by the plaintiff at night, and if he

of his own accord or through his grazier gave grass he must be held to have done so as a free gift

There is also a finding that no damages could be awarded, but that has no more connexion with the case than the finding that there is no forest in the village; if the cattle grazed on the plaintiff's land at all it was with his consent.

After an examination of the evidence (made apparently for the first time at the hearing of the appeal here and at the suggestion of the Court) the claim in respect of fodder supplied has been withdrawn. The whole of the evidence on that point in the two cases combined is as follows: Gorelal Ahir, the grazier in charge of the cattle said in Tara's case (P. W. 2): "I never supplied grass to the

Fakir and another—Defendants—Appellants.

v.

Dattatraya Krishna Wani and another—Plaintiffs—Respondents.

Second Appeal No. 127 B of 1926, Decided on 27th January 1927, from the decree of the Dist. J., Amraoti, D/- 29th January 1926, in Civil Appeal No. 106 of 1925.

(a) *Civil P. C., S. 100—Second Appellate Court can interfere with a finding as to the legal status of a party.*

It is competent for the second appellate Court to interfere with the finding of the lower appellate Court as to the legal status of a party.

[P. 201, C. 2]

(b) *Berar Land Revenue Code, S. 78 (2)—Enhancement of rent from time to time—Annual formal leases granted—Presumption is against permanent tenancy.*

Although the fact that the rent may be enhanced from time to time would not necessarily be destructive of a permanent tenancy, yet where from year to year there has been a formal and annual lease the fact of the rent varying largely from time to time is a strong indication that the tenancy was only an annual one.

[P. 201, C. 2]

(c) *Practice—Second appeal—New point.*

A point that was not raised in the first appellate Court cannot be raised in second appeal.

[P. 201, C. 2]

V. N. Herlekar—for Appellants.

M. V. Joshi and R. R. Jayavant—for Respondents.

Judgment.—The facts of the case are sufficiently clear from the judgments of the two lower Courts and need not be repeated here. On this second appeal coming on for hearing the pleader for the defendant-appellants only pressed the grounds of appeal relating to fields Nos. 72 and 75, to the question of the validity of the notice alleged to have been sent to the appellants and to the effect of Defendant 2, who was not the manager of the family, having executed the kabulyats.

The first Court found that the defendants were permanent tenants so far as fields Nos. 72 and 75 were concerned. In this connexion the plaintiff-respondents admitted that field 75 had been cultivated by defendants' grandfather, Adku, in 1874, while field 72 was cultivated by Adku's brother Shrawan in the same year. As regards what happened before 1874, the position is obscure, the

cattle at any time." In the same case Nanhu Ahir (P. W. 3), another servant of the plaintiff's said: "I supply grass to the cattle," and in cross-examination he said: "Grass is supplied to the cattle in Gowar out of charity at the instance of the plaintiff". A third witness Satoba Gond (P. W. 4) said: Nanhu supplied grass to the cattle." In the other case Nanhu did not appear as a witness, Satoba (P. W. 4) did not mention this matter, and Gorelal (P. W. 2) said: "Plaintiff's cattle (sic) supplies grass to cattle, but I don't know to whose and what cattle he supplies grass." It was hardly necessary then to go into the question of agreement and to deduce from the absence of one that if the plaintiff did supply fodder to the cattle he did it "out of charity."

In respect of the amount claimed as payment for grazing, the outstanding fact governing the whole case, mentioned in the plaint and at the beginning of both judgments, has been left out of sight. That is that neither defendant is a tenant in the mahal in which the land in question is situated. The mahal in which they are tenants happens to be contiguous, being indeed included in the same village, but that gives them no more right to nistar than if it were ten miles away. They must undoubtedly pay for having grazed their cattle on the plaintiff's land, and they have both admitted that one rupee a head for each year is a proper charge.

The decree of the lower appellate Court will accordingly be set aside and in its place a decree will issue ordering the defendant Tara Teli to pay to the plaintiff the sum of Rs. 20 with interest at 1 per cent. per mensem from the date on which the suit was instituted (the 14th of July 1925) till the date of payment, and also all the costs incurred by him in all three Courts. The Court-fee paid by him was Rs. 5-4-0 in excess of what he would have had to pay on a claim of Rs. 20; but that is more than counter-balanced by the ridiculous pleader's fee of Rs. 4-8-0 allowed in each of the Courts below, and the rest of the costs would have been the same even if he had claimed no more than Rs. 20. The pleader's fee in this Court will be twenty rupees.

D.D.

Decree set aside.

plaintiffs' allegation being that these two fields have been waste land. As is clear from the documents summarised in paras. 8 and 10 of the lower appellate Court's judgment, field No. 72 subsequently first appeared in Exhibit P. 5 which relates to the year 1916, but, as shown by the learned District Judge, it is clear that from 1903 to 1912 field No. 72 was not with the widow of Shrawan and that it was apparently taken up afresh again in 1916. Field 75, on the other hand, has been taken on yearly leases for some 20 years from 1902 as shown by the lower appellate Court.

It is urged on behalf of the present defendants that the plaintiffs, in their reply in the first Court, admitted the continuous possession of the defendants, but the plaintiffs' statement must be taken as a whole and their position very clearly was that in the case of either field there was a distinct annual lease given from year to year. I do not, therefore, think that S. 78 (2) of the Berar Land Revenue Code can possibly apply in the circumstances of the present case. Here, the duration of the tenancy is known and there has been no proof whatever that it existed before 1874. Not only so, but in the case of one of these fields there has been a definite proof of a long break thereafter, while in the case of the remaining field it is perfectly clear that all through there has been a definite and specific annual contract of tenancy. If documents like Exhibits P. 5, P. 6 and P. 7 as well as others are examined in detail, it will be found that the terms of the tenancy differed greatly from year to year. The rent never remained a fixed factor, and all the circumstances of this case point to the irrefragible conclusion already arrived at by the lower appellate Court that in the case of these two fields there was a definite letting from year to year on terms which varied almost annually and, in these circumstances, it seems clear to me that no presumption in favour of permanent tenancy can possibly arise in the particular circumstances of the present case. In view of the changing conditions of the yearly leases of the field it is utterly impossible to accept the explanation of the first defendant, Fakira, that these kabulyats were only executed in token of the ownership of the plaintiffs-respondents and of the payment of lease money. Very

obviously, the only legal presumption, which can arise from the continued execution of these kabulyats over a long period of years, is that the executant knew that he was taking an annual lease of the fields, and any other conclusion seems to me an utterly impossible one in the circumstances of the present case.

The pleader for the appellants has relied on *Raghunath v. Lakshuman* (1) as authority for two propositions, viz., (1) that it is open to this Court sitting as one of second appeal to interfere with the finding of the lower appellate Court as to the legal status of the defendants, and, secondly, that permanency of tenancy and fixity of rent are two distinct matters and that a permanent tenancy may still exist, even although a discretion is vested in the landlord to enhance the rent from time to time. As regards the first proposition I fully accept it and I also agree that the fact that the rent may be enhanced from time to time would not necessarily be destructive of a permanent tenancy. But, at the same time, as regards this latter point it seems to me idle to contend, in the circumstances of the present case, where from year to year there has been a formal and annual lease of the two subjects in dispute that the fact of the rent varying largely from time to time is not a strong indication that the tenancy was only an annual one. I can therefore, see no reason for disturbing the finding of the lower appellate Court to the effect that the appellants are not permanent tenants.

As regards the two remaining points, viz., the notice alleged to have been sent to the defendants and the authority of Defendant 2 to execute the kabulyats, it is pertinent to point out that the only point pressed in the cross-objections by the present appellants in the lower appellate Court related to the question of their permanent tenancy in the remaining fields in suit. It is not, in reality, therefore, open to the appellants to now raise this point on second appeal. I may remark, however, that I see no reason why the evidence of Sayad (P. W. 8), village postman, should not be accepted. If the present appellants thought that they would have derived any benefit from the production of the delivery book referred to by the said witness, it was open to them to have called for it.

(1) [1900] 2 Bom. L. R. 93.

As regards the other point, which related to the lease of 1922, it, in effect, becomes immaterial in view of the general finding that the appellants are not permanent tenants.

The appeal is accordingly dismissed. The appellants must bear the respondent's costs. Costs in the lower Courts as already ordered.

G.B.

Appeal dismissed.

A. I. R. 1927 Nagpur 202

KINKHEDE, A. J. C.

Ramjiwan Marwadi—Applicant.

v.

Lahimi—Non-applicant.

Criminal Revision No. 180-B of 1926, Decided on 17th January 1927, against the order of the S. J., Akola, D/- 9th September 1926, in Criminal Revision No. 29 of 1926.

(a) *Criminal trial—Laying of information before Magistrate is institution.*

Institution of a criminal proceeding is the laying of an information before the Magistrate and as soon as the Magistrate receives the complaint that is done. [P 202 C 2]

(b) *Stamp Act, Ss. 65 and 70—Offences under—Private individuals cannot start.*

It is not within the competence of private individuals to start criminal law in motion in respect of offences under the Stamp law.

[P 202, C 2 ; P 203, C 1]

(c) *Stamp Act, Ss. 70, 30 and 65—Presentation under Ss. 30 and 65 without sanction—Subsequent according by Collector will not validate institution—Defect is not curable by Criminal P. C., S. 537.*

For a prosecution for an offence under Ss. 30 and 65 of the Stamp Act, the sanction of the Collector is indispensable and subsequent according of sanction cannot validate institution of such proceedings without sanction nor is the defect curable by S. 537, Criminal P. C. : 9 Bom. 27 ; 9 Bom. 288 ; 21 P. R. 1915 Cr. ; 37 Cal. 467, Rel. on : [P 202, C 2 ; P 203, C 1]

Atmaram Bhagwant and S. A. Ghadgay—for Applicant.

G. P. Dick and S. C. Dutt Chaudry—for Non-applicant.

Order.—The only objection of law pressed in this revision is one of want of jurisdiction in the Magistrate to take cognizance of the offence in the absence of sanction by the Collector under S. 70 of the Stamp Act to the institution of the complaint in this case. It will be seen that the complaint in question was received by the Sub-Divisional Magistrate

on 1-5-1926. S. 190 of the Criminal P. C. lays down that

Except as hereinafter provided.....Sub-Divisional Magistrate.....may take cognizance of any offence.

(a) Upon receiving a complaint of facts which constitute such offence,

It is not shown that the present case is excepted from the scope of S. 190. It therefore follows that as soon as the Magistrate received the complaint he must be deemed to have taken cognizance of the offence. Had he returned the complaint to the complainant for getting it endorsed with the Collector's sanction which is indispensable to the institution of a criminal prosecution for an offence under Ss. 30 and 65 of the Stamp Act the matter would have been different. He retained his seisin over the case, and forwarded the complaint under his own endorsement to the Collector "for favour of sanction of prosecution under Ss. 30 and 65 of the Stamp Act" The complaint was returned to him by the Deputy Commissioner and on receipt thereof he recorded an order under date 8-5-26 to the following effect :

"Read D. M.'s order dated 7-5-26. Issue a notice to the complainant to appear on 18-5-26" under his own signature. This clearly shows that the complaint was not re-presented to him nor can it be said that he received it on 8-5-26 at the hands of the complainant after the Collector accorded his sanction to the lodging of the complaint. It is therefore idle to say that the complaint was not instituted in his Court until after the Collector had accorded his sanction to its institution. Institution of a criminal proceeding is the laying of an information before the Magistrate. This was done as soon as the Magistrate received the complaint on 1-5-26. The subsequent according of sanction of the Collector cannot validate its invalid initiation. As the offence is mainly an offence against the Stamp law, the power of determining whether the cognizance shall be taken by the Court of any offence punishable under the Stamp Law has been deliberately reserved to the Collector. Such a safeguard is manifestly necessary and the maintenance of this control by the Collector, of the highest importance.

I do not think, it is within the competence of private individuals to start

criminal law in motion in respect of offences under the Stamp law. The question must very often depend upon considerations of policy and several other circumstances, of which the Legislature has thought fit to appoint the Collector as the sole arbiter, unless the Local Government generally or the Collector specially, authorizes some other officer to act in this behalf, under S. 70 (1) of the Stamp Act.

No doubt the Magistrate had stayed his hands in the matter of the trial until the sanction was granted. But I am not prepared to hold that the defect in the initiation of proceedings is capable of being cured by obtaining the necessary sanction later on at a subsequent stage of the prosecution. The absence of such a sanction was treated as fatal to the initiation of the criminal prosecution and to the conviction in *Queen-Empress v. Jethmal Jagraj* (1) and in *Emperor v. Ramji Lal* (2). In *Queen-Empress v. Morton* (3) a sanction subsequently obtained was held to be of no effect for purposes of Ss. 198 and 532. Criminal P. C. The same was the case in *Borindra Kumar Ghose v. Emperor* (4) which was a case in which a complaint for an offence under S. 121 of the Indian Penal Code was made and sanction under S. 196 Criminal P. C. was held to be legally necessary for the initiation of the prosecution.

The learned Sessions Judge erred in law in thinking that S. 537 of the Criminal P. C. could cure the defect, in spite of its recent amendment which perhaps failed to attract his attention.

The conviction on the basis of a criminal prosecution not legally initiated is therefore set aside and the fine, if realized, is ordered to be refunded.

R.D.

Conviction set aside.

A. I. R. 1927 Nagpur 203

KOTVAL, A. J. C.

Bhagia and others—Accused—Appellants.

v.

King-Emperor—Opposite Party.

Criminal Appeal No. 107-B of 1926, Decided on 31st January 1927, from the judgment of the Addl. S. J., Akola, in Sessions Trial No. 30 of 1926.

(a) *Criminal P. C., S. 162 overrides Evidence Act, S. 27.*

Section 162 of Criminal P. C., overrides the provisions of S. 27, Evidence Act. [P 203 C 2]

(b) *Interpretation of statutes—Side notes are not real guide to Legislature's intention—Section must be interpreted according to its plain language though other provisions are abrogated.*

Side notes are no real guide to the intention of the Legislature. The safest guide to it is the language of the section. A section must be interpreted according to its plain language although the provision of some other Code is abrogated. [P 203 C 2]

Judgment.—This judgment governs also Criminal Appeals Nos. 108-B to 111-B of 1926, by Shekhji, Bahadur Khan, Govinda and Tukaram. I do not agree with the learned Sessions Judge's opinion that S. 162, Criminal P. C., does not override the provisions of S. 27 Evidence Act. The Sessions Judge interprets the words "any person" in 162 as "any person other than the accused." His reasoning is this. Sections 160 and 161, Criminal P. C., refer to witnesses as side notes to them indicate: S. 162 which immediately follows these must, therefore, have been intended to refer by association to witnesses. Side notes are no real guide to the intention of the legislature. The safest guide to it is the language of the section and it is difficult to see how it could be plainer. Abrogation by implication is by no means uncommon and that such abrogation of S. 27 of the Evidence Act results is no reason for not interpreting the section according to its plain language. Nor is the provision contained in S. 27 of the Evidence Act of such paramount importance that there should be great hesitation in accepting an implied abrogation of it. It is to be further noted that S. 162, Criminal P. C., by Cl. (2) expressly saves S. 32 (1) of the Evidence Act. The implication of the abrogation of S. 27, Evidence Act, is so obvious that

(1) [1885] 9 Bom. 27.

(2) [1915] 38 P. W. R. 1915 Cr.=31 I. C. 643 =21 P. R. 1915 Cr.

(3) [1885] 9 Bom. 288 (F. B.).

(4) [1910] 37 Cal. 467=7 I. C. 359=14 C. W. N. 1114.

we should expect that section also to be expressly saved.

Apart, however, from the statements admissible under S. 27, Evidence Act, there is sufficient evidence to support the convictions of the appellants. Bhagaji admittedly produced a lota Art. B. 1, containing 15 Chandori and 62 Buchadawala coins from a coudung heap wherein they were concealed; also the Charvi, Art. C. Govinda produced 7 Chandori coins, 33 Buchadawala and 2 rupees of 1862 which were buried in his field. Tukaram who is Govinda's brother is proved to have possessed 70 Buchadawala coins which he gave to a Sonar Kashiram (P. W. 9) to make into ornaments which were before the Court. He produced 8 Chandori coins from a roof.

Shekhji produced a lota containing 15 Chandori and 38 Buchadawala coins which were buried in his verandah. Bahadur Khan is proved to have been in possession of 14 Chandori and 22 Buchadawala coins which he gave to Umarkhan (P. W. 8) in payment of a debt.

None of the appellants have satisfactorily accounted for their possession of these coins and it is sufficiently proved that they came out of Venkatrao's store which was buried in his house with the Charvi, Art. C, and stolen.

All the appeals are dismissed.

G. B.

Appeals dismissed.

A. I. R. 1927 Nagpur 204

HALLIFAX, A. J. C.

Laharam—Defendant—Appellant.

v.

Gurumukh Rao and *another*—Plaintiffs—Respondents.

Second Appeal No. 25 of 1926, Decided on 3rd December 1926, from a decree of the Addl. Dist. J., Bilaspur, D/- 30th October 1925, in Civil Appeal No. 111 of 1925.

Evidence Act, S. 35—Area in question—Settlement map is more reliable than khasra.

Inasmuch as the Settlement map forms the original record of area of a field and the entry in the khasra is no more than its copy, the former is more reliable in case of conflict between the two in respect of the area. [P 204, C 2]

W. Y. Deshmukh—for Appellant.

M. R. Bobde—for Respondents.

Judgment.—The plot of land in dispute adjoins land belonging to each party, and each of them asserts that it always has been a part of his land. The issue has been narrowed down to the question of whether it was recorded in the papers of the Settlement of 1910-11 as a part of the land of the plaintiffs or of the defendant. The Settlement map shows it is a part of the defendant's land, and the khasra of the same year, by the areas recorded in it, shows it as belonging to the plaintiffs. The learned Additional District Judge has held that the khasra is more reliable than the map, and has, therefore, given the plaintiffs a decree for possession.

The value of the khasra entries is shown by their being completely wrong in the matter of the area under cultivation. But anyhow, the idea that the khasra is more reliable than the map or that they are independent pieces of evidence, is based on the mistake that they are prepared independently. It requires little knowledge of survey to see that the area of a plot of land cannot be ascertained from the land itself unless it is of some quite regular shape: there must be the intermediate stage of the delineation of the land on a map, from which the area can be calculated.

As a matter of fact also, in the preparation of all Settlement Records, each field is first plotted on the map, and the area is then ascertained from the map by means of what is known as an "area comb" and entered in the khasra. The map, in respect of area, is then the original record, and the entry in the khasra is no more than a copy, in a different notation. It is, therefore, beyond question that the plot in dispute was entered at Settlement as a part of the plot belonging to the defendant-appellant, though that entry was erroneously copied into the khasra. The erroneous entry has been frequently copied since then, but that does not make it any more correct.

The decree of the lower appellate Court will be set aside and that of the first Court dismissing the suit will be restored. The plaintiffs-respondents will pay the whole of the costs of both parties in all three Courts. The pleader's fee in this Court will be thirty rupees.

J.V.

Decree set aside.

A. I. R. 1927 Nagpur 205

FINDLAY, J. C.

Hazarimal-Nanuram—Plaintiff—Appellant.

v.

Ganpatrao Yadorao Pande—Defendant—Respondent.

First Appeal No. 131 of 1925, Decided on 27th January 1927, from the decree of the 1st Cl. Sub-J., Bhandara, D/- 29th August 1925, in Civil Suit No. 62 of 1923.

Transfer of Property Act, S. 53—If parties intend genuine sale, transaction is not bad.

Although the object of a transfer may be to defeat an anticipated execution, what really is of importance is the motive of the purchaser. If his motive and that of the vendor was that a genuine sale should be effected, such a transaction is not necessarily bad, even although the effect is that any other particular creditor or all the remaining creditors are put at a disadvantage thereby; 25 Bom. 202 and 24 Cal. 825, *Rel. on.* [P 205, C 2]

B. K. Bose, V. Bose and J. B. Ghosh—for Appellant.

Y. V. Jakatdar and V. M. Jakatdar—for Respondent.

Judgment.—The plaintiff-appellant, Hazarimal Nanuram, brought the present suit in the Court of the Subordinate Judge, first class, Bhandara, for a declaration that a certain motor-car was not liable to be sold in execution of a decree in Civil Suit No. 27 of 1923 obtained by the defendant-respondent, Ganpatrao Yadorao Pande, against one Martandrao. The car, as a matter of fact, has already been sold in execution of the decree, but the parties have agreed that, in the case of the suit being successful, the plaintiff should be paid Rs. 4,400 as the price of the car. The plaintiff's case was that, before attachment of the motor-car before judgment in a suit filed by the defendant, Martandrao had sold the car to him on 16—3—1923. The connected application for attachment was filed on 17—3—23, while the actual attachment was effected on 27—3—23. The defendant's case was that there had been no genuine sale of the car by Martandrao to the plaintiff and that the connected transaction was, in reality, a fraudulent one intended merely to defeat the attachment effected at the instance of the defendant. The lower Court, after a lengthy consideration of the evidence, came to the conclusion that there had been no genuine

sale of the car by Martandrao to the plaintiff and that the whole transaction was merely a fraudulent device intended to shield the car from Martandrao's other creditors. The suit was accordingly dismissed.

The sale transaction is evidenced by two receipts (Exs. P. 2 and P. 3). The former is executed by Martandrao to evidence the alleged sale of the motor-car to the plaintiff in full satisfaction of certain debts amounting to Rs. 9,000. The three bonds (Exs. P. 4, P. 5, and P. 6) for Rs. 3,000, 2,000 and 1,000 respectively of the year 1921, together with a debt due on a lost receipt for Rs. 205, are said to represent the consideration of the sale. Exhibit P. 3, on the other hand, purports to be a receipt passed by the plaintiff-appellant in favour of Martandrao showing the acceptance by the plaintiff of the car in full satisfaction of the debts referred to in Ex. P. 2.

The real point for consideration, therefore, in this case is, in reality, purely one of fact. Was there a genuine sale of the car to the plaintiff-appellant before its attachment by the defendant-respondent? On the part of plaintiff-appellant it has not been denied that there was, in reality, a race between creditors to get what they could out of the estate of Martandrao. His case is that Martandrao was known by him and by the other creditors to be heavily indebted, that he heard or knew that an attachment by the defendant-respondent was contemplated, or was in course of coming into effect, and that, therefore, he hurried to the spot and managed to secure the sale of the motor car in his own interests before the attachment was effected. The law applicable is perfectly clear. Although the object of such a transfer may be to defeat an anticipated execution, what really is of importance is the motive of the purchaser. If his motive and that of the vendor was that a genuine sale should be effected, such a transaction is not necessarily bad, even although the effect is that any other particular creditor or all the remaining creditors are put at a disadvantage thereby: cf. *Bhagwant v. Kedari* (1) and *Ishan Chunder Das Sarkar v. Bishu Sirdar* (2). The real question involved

(1) [1901] 25 Bom. 202=2 Bom. L. R. 986.

(2) [1897] 24 Cal. 825=1 C. W. N. 665.

is whether there was a genuine passing of the consideration and whether the real intention of the alleged vendor and vendee was that a sale should take place.

A great deal seems to me in the present case to hang on the evidence of Mr. Palsole pleader (P. W. 9). This witness admits having been present at Amgaon when the two receipts (Exs. P. 2 and P. 3) were executed. He had been acting both for the plaintiff and for Martandrao in various cases they were concerned in. According to him, he was called to Amgaon in connexion with certain civil cases by Martandrao and reached there early on the morning of the 16th of March 1923. Negotiations for sale of the car took place that day in his presence, and the plaintiff agreed to accept the car in full satisfaction of what was due under the three bonds and the receipt referred to above. There can be little doubt but that whatever the nature of the transaction between the parties to this case was, it was carried through on the advice, and under the auspices, of this witness who has frankly admitted that he knew that Govindsingh, Ganpat Bhau and others were on the point of attempting to effect an attachment of the motor-car in question. The witness explains that, as he was satisfied that the car was likely to be attached, even although at the moment the attaching creditors could not find it, he felt disposed to show preference to the plaintiff over other creditors and so induced Martandrao to sell the car to the plaintiff. Much has been made of the fact that shortly after the sale of the car, Martandrao, at the instance of the plaintiff, drove the car to Gondia leaving Amgaon at the somewhat unusual hour of 4 a.m. Very obviously, every endeavour was being made by Martandrao as well as the plaintiff and this witness to get the car out of the way as quickly as possible. The story is that no suitable place for keeping the car could be found in Gondia, and the party accordingly went on to Dongargarh, where enquiry is said to have been made for a truck in order to send it to Calcutta for sale. Dongargarh was obviously selected on the advice of the witness because it had occurred to him that there would be difficulties in the way of attachment there, Dongargarh being situated in a Feudatory State.

For my own part, I find it very difficult, on the proved facts of the present case, to see any ground for the theory advanced on behalf of the defendant-respondent, viz., that there was no genuine sale of the car by Martandrao to the plaintiff and that an unreal and nominal sale transaction was carried through with the mere fraudulent intention of defeating Martandrao's other creditors and not with the object, on the part of the plaintiff-appellant, of securing what was apparently a comparatively valuable car, the price of which at the time must have been about Rs. 6,000, or a little less. That the whole transaction indicated very sharp practice is clear enough and the conduct of Mr. Palsole (P. W. 9) undoubtedly advising and helping to carry out the sale transaction may, from certain points of view, be open to criticism. Leaving that aside, however, it is difficult to understand why the plaintiff-appellant, on the version of the case, put forward by the defendant-respondent, should have taken all the personal trouble he did in going to Amgaon and in making the attempts he did to get the car quickly out of the way of attaching creditors unless he hoped to reap a substantial benefit himself out of the transaction.

It has been urged on behalf of the defendant-respondent that the fact of Martandrao himself driving away the car suggests that he was presumably still the owner. But I do not think that such a theory necessarily follows at all. The plaintiff had undoubtedly a certain hold over Martandrao and, if, as I believe, the car genuinely was intended to pass to him, the appellant was naturally in all anxiety to get the car away from Amgaon before any of the attaching creditors could effect their purpose. The very active part, which the plaintiff personally played in this transaction, seems to me certainly more easily reconcilable with the theory that there was a real sale of the car to him than with the opposite one.

In connexion with the matter of the consideration for the sale of the car, a good deal has been made of the fact that the receipt of 1921 of the plaintiff and his account-books have not been produced. I do not think it is wise to lay much stress on this point in view of the fact that, in 1921, a report had been undoubt-

edly made to the police with regard to the loss of the account-books : of the evidence of Ramnath (P. W. 4). The account-books of Martandrao are also similarly not to be found and the deposition of his agent Sheoram (P. W. 1) in this connexion is undoubtedly unsatisfactory. Martandrao has obviously been very much embarrassed financially and it is not unlikely that the account-books have advisedly been made to disappear. What I am not at all convinced about is, however, that their suppression had necessarily any connexion with the present incident. Martandrao may for many other reasons have been anxious to have them out of the way.

A great deal has been made on behalf of the defendant-respondent out of the admission of Sheoram that, in addition to Exhibits P. 2 and P. 3, a third receipt bearing a 1 anna stamp passed at the same time. Ghanshamdas (P. W. 2) also says that there was a third receipt but cannot remember what it related to. It seems to me, however, a somewhat extravagant theory to assume, as has been suggested on behalf of the respondent, that the third receipt was one acknowledging the alleged hollow nature of the transaction. There were undoubtedly further transactions between the plaintiff and Martandrao, and the receipt, if there was one, may have referred to some incidental or extraneous matter. Anyhow, there seems to me quite insufficient matter on record on which to base the theory that the third receipt must have been one which, if produced in Court, would have refuted the genuineness of the alleged sale of the motor-car.

Nor can I see any sufficient ground for doubting that the bonds P. 4, P. 5 and P. 6 did represent the consideration of the sale. The opposite view taken by the lower Court seems to me founded on suspicion rather than on evidence and the bonds in suit were executed after the lease P. 26. I see in short no reason to reject the evidence of P. W. 9, Mr. Palsole, and it follows that the plaintiff is entitled to the declaration asked for in the plaint. A decree will issue accordingly and the judgment and decree of the lower Court being reversed. I am, however, of opinion that the plaintiff in this case by his sharp practice, brought himself on the verge of civil liability at least and that it is in the interests of justice that

in such a transaction as he entered into a direct effect of which was defeat so far as the claims of other creditors should be discouraged. I accordingly decline to grant him his costs and I order parties to bear their own costs in both Courts as incurred.

G.B.

Appeal allowed.

A. I. R. 1927 Nagpur 207

HALLIFAX, A. J. C.

Sukhdeo—Defendant—Appellant.

v.

Ujal—Plaintiff—Respondent.

Second Appeal No. 138 of 1926, Decided on 21st January 1927, from the decree of the Addl. Dist. J., Raipur, D/- 3rd December 1925.

C. P. Land Revenue Act (1917), S. 107—Lease in A's name—Money belonging to A and B—B's right against A is not affected—Principle applies whether lease is granted voluntarily or lessor is compelled to give it—Benami.

When any person takes in his own name a lease in perpetuity, or indeed any other lease or any other contract, with money belonging to himself and others, the rights of these others against him are not affected by his omission to mention their names, though their rights and liabilities in respect of the other party to the contract may be. There is no difference in principle when the lessor does not grant the lease voluntarily but is compelled to do so under the provisions of S. 107 of the Land Revenue Act.

[P 207 C 2]

S. K. Ghosh—for Appellant.

Judgment.—When any person takes in his own name a lease in perpetuity, or indeed any other lease or any other contract, with money belonging to himself and others, the rights of those others against him are not affected by his omission to mention their names, though their rights and liabilities in respect of the other party to the contract may be. This is ordinarily understood when, for instance, the Manager of a joint Hindu family takes a perpetual lease of a village in his own name. It is however frequently imagined, as was done in the lower appellate Court in this case, that there is some difference when the lessor does not grant the lease voluntarily but is compelled to do so under the provisions of S. 107 of the Land Revenue Act.

The case can hardly be said to have been conducted with much care in the Courts below. It seems more than probable that the fields in question in the

suit of 1902 could easily have been proved to be the same as those in question here, but no attempt to do this was made. Also the only documentary evidence of the length of possession of this land by Sukhdeo and his father Hari was a note made by the Patwari on the certified copy of the entry in the jamabandi for 1924-25 to the effect that that possession had been continuous since the Settlement of 1906-07. That is a note made on the copy, not a copy of a note made in the jamabandi, but even if it were a note in the jamabandi it would be of no use whatever as that jamabandi was not written till the very end of the year 1924, if not after it, and the present suit was filed on the 15th of September of that year.

The note is, however, a very clear indication of further evidence in earlier jamabandi entries, which nobody took the trouble to produce. Copies of the entries for each year from 1907-08 to 1924-25 have been tendered in evidence in this Court. They are necessary for the decision of the question of fact, left undecided in the lower appellate Court, of whether the defendant Sukhdeo held the fields in dispute under an arrangement with the other co-sharers in the theka which is binding on them, which can be proved or disproved by the length of his separate possession of them. The certified copies have been accepted in evidence for reasons that need not be further stated.

These jamabandi entries show Sukhdeo's father Hari in possession from 1907-08 till 1921-22, when he died, and Sukhdeo himself thereafter. They go a long way to establish the allegation that that separate possession had lasted for the last forty years, which Sukhdeo supported by his own deposition and the depositions of several witnesses and the plaintiff Ujjal did nothing at all to contradict, even by appearing as a witness himself, beyond making the false statement in his plaint that Sukhdeo had quite lately taken wrongful possession of the land of which he had no knowledge till five months before he filed the suit.

It is anyhow beyond all doubt that the defendant held peaceful separate possession of this land for sixteen years, and nothing more is required to prove that he held it by an arrangement with the plaintiff and any other co-sharers

there may be that he should do so. The position is not only analogous or similar to that of a co-owner of a village holding sir land separately; it is exactly the same. It is only by a misunderstanding of the provisions of the Land Revenue Act that there appears to be any difference. The law there laid down would have been the same on this point without the first proviso to Cl. (a) of S. 109 (1), which is only explanatory, but the necessity of explanation is the more evident when the section is misunderstood in spite of it.

The decree of the lower appellate Court will be set aside and that of the first Court dismissing the suit will be restored. The plaintiff respondent will pay the whole of the costs of both parties in all three Courts. The pleader's fee in this Court, where the respondent did not appear, will be twenty-five rupees.

D.D.

Decree set aside.

A. I. R. 1927 Nagpur 208

HALLIFAX, A. J. C.

Basant Kaur and another—Plaintiffs—Appellants.

v.

Shiocharan and others—Defendants—Respondents.

Second Appeal No. 213 of 1926, Decided on 23rd February 1927, from the decree of the Dist. J., Raipur, D/- 26th January 1926, in Civil Appeal No. 51 of 1925.

Central Provinces Tenancy Act (1920), Ss. 46 and 47—Mukaddam Gumashta is a village servant.

The Mukaddam Gumashta is a village servant and in that respect is in exactly the same class as the Kotwar, being merely higher than the Kotwar in the performance of practically the same duties. A holding granted to him in lieu of service is village service holding.

V. R. Pandit and G. L. Subhedar—for Appellants.

M. B. Niyogi—for Respondents.

Judgment.—It is clear that the defendants must inevitably be ejected from the land in dispute, and it is admitted by both sides that this can be done by a Revenue Officer. Instead of applying to a Revenue Officer the plaintiffs have spent nearly two years and much money in trying to establish their contention that it can also be done by a civil Court, and instead of going off the land before

they are thrown out the defendants have spent the same time and probably no less money in trying to establish that it cannot.

The facts are these. Gajraj Kavar, the original defendant, was the Mukaddam Gomashita of Bharsela, which is owned by the first plaintiff Basant Kuar Bai, and he held an area of 54.07 acres rent-free as a village-service holding. An order was passed by a Revenue Officer on the 10th of March 1924 removing Gajraj from his office as too old for its duties, as he was then about eighty years of age, and appointing Kishorilal Bania, the second plaintiff, in his place. It was also ordered that he should hand over his village-service holding to his successor. The plaintiffs assert that he did give Kishorilal possession of the holding but ousted him again in the following August. Gajraj denied that he ever gave up possession at all.

The plaintiffs filed the present suit on the 15th of October 1924 claiming possession of the holding. Gajraj died on the 23rd of June 1925 after the trial was finished. His sons, the present defendants, were then impleaded in his place, and judgment was delivered on the 31st of August 1925. The decree ordered possession to be delivered to the plaintiffs. On appeal by the defendants their contention that the civil Court had no jurisdiction in the matter was accepted and the suit was dismissed. The plaintiffs have appealed again to this Court.

The decision of the lower appellate Court is undoubtedly correct on any finding in respect of the one fact in dispute. The holding is recorded as a village-service holding in the papers of the current Settlement. It is urged that a Mukaddam Gomashita is not a village-servant, but a servant of the Mukaddam. There is no definition of a 'village-servant' but it seems clear that the Mukaddam in that respect is in exactly the same class as the Kotwar, who is admittedly one, being merely higher than the Kotwar in the performance of practically the same duties.

Kishorilal has therefore been either dispossessed of his village-service holding or excluded from it, by Gajraj and after him by his sons, and he must apply to a Revenue Officer to be put in possession. If he has been dispossessed that will be under S. 47 of the Tenancy Act and if

Gajraj never gave up possession it will be under S. 46, but in either case it must be done by a Revenue Officer, not by a civil Court.

After handing over possession the defendants will of course be at liberty to contend, in the proper way and the proper place, whatever they may be, that the holding is not a village-service holding at all, but an occupancy holding belonging to Gajraj originally of which the rent was remitted when he became Mukaddam Gomashita; at present it completely fills the definition of a village-service holding and must be so regarded till the contrary is proved.

The appeal will be dismissed, but there seems to be no reason why either party should be made to pay the expenses incurred by the other in the fight over a question which is of no practical interest to anybody and, to them, cannot have even an academic interest. Each party will pay its own costs in all three Courts.

D.D.

Appeal dismissed.

A. I. R. 1927 Nagpur 209

FINDLAY, J. C.

Rajaram—Accused—Applicant.

v.

Emperor—Non-Applicant.

Criminal Revision No. 55 of 1927, Decided on 30th March 1927, from an order of the City Mag., Nagpur, D/- 21st January 1927, in Criminal Case No. 21 of 1927.

Criminal P. C., S. 349—Nagpur City is not a sub-division of Nagpur District—Order of City Magistrate disposing of a reference made to him under S. 349 is void.

Nagpur City has not been declared a sub-division of the Nagpur District and until therefore action is taken in this respect with reference to Ss. 4 (u), 8 and 13, the City Magistrate, Nagpur, cannot be described as a Sub-Divisional Magistrate for the purposes of having cases referred to him under S. 349 by 2nd and 3rd Class Magistrates in Nagpur City. An order of the City Magistrate disposing of a reference to him is therefore void as being made without jurisdiction. [P 210 C 1]

V. N. Harlekar—for Applicant.

G. P. Dick and P. Lobo—for Non-Applicant.

Order.—The applicant Rajaram was tried by the Honorary Second Class Magistrate, Sitabuldi for an offence

under S. 324 of the Indian Penal Code, and the Honorary Magistrate was of opinion that he was guilty thereof. He accordingly referred the case, purporting to act under S. 349 of the Criminal Procedure Code, to the Magistrate, Nagpur, for disposal. The City Magistrate proceeded to pass orders in the case and convicted the applicant of an offence under S. 323, Indian Penal Code, and sentenced him to a fine of Rs. 50.

The applicant has applied to this Court in revision on the ground that the reference made by the Honorary Magistrate to the City Magistrate was illegal having regard to the terms of S. 349, Criminal Procedure Code. Under the said provision the trying Magistrate can only refer the case to the District Magistrate or to the Sub-Divisional Magistrate to whom he is subordinate. The learned Government Advocate who appeared on behalf of the Crown has admitted here that Nagpur City has not been declared a sub-division of the Nagpur District. Until action is taken in this respect with reference to Ss. 4 (u), 8 and 13, Criminal P. C., it follows that the City Magistrate, Nagpur, cannot be described as a Sub-Divisional Magistrate for the purposes of having cases referred to him under S. 349, Criminal P. C., by Second and Third Class Magistrates in Nagpur City. The order of the City Magistrate, dated 21st January 1927, was, therefore, void as being made without jurisdiction. I accordingly reverse that order and the case will now go back to the District Magistrate, Nagpur, who will proceed to deal with it on the merits himself under S. 349, Criminal P. C.

It has been suggested before me that the applicant is entitled to an acquittal on the merits in this Court, but I cannot accept this contention. This Court is sitting as one of criminal revision and apart from the flaw in the proceedings referred to above, no allegation was made in the petition of revision to this Court that the order of the Second Class Magistrate was, except in the one single respect already referred to, wrong or illegal.

I accordingly direct the District Magistrate, Nagpur, to take the case on his own file and dispose of it as a reference under S. 349, Criminal P. C.

R.D.

*Order reversed.***A. I. R. 1927 Nagpur 210**

FINDLAY, J. C.

Damdoo—Complainant—Applicant.

v.

Harba and others—Accused—Non-Applicants.

Criminal Revision No. 6 of 1927, Decided on 23rd February 1927, from the order of the Bench of Hony. Mags., 2nd Cl., Sitabuldi, Nagpur, D/- 19th October 1926, in Criminal Case No. 306 of 1926.

(a) *Criminal P. C., S. 242—Omission to comply—Failure of justice not caused—Irregularity is curable—Criminal P. C., S. 537.*

The omission to comply with the provisions of S. 242, is nothing more than a curable irregularity where a failure of justice has not been caused. [P 211 C 1]

(b) *Criminal P. C., S. 244 (1)—Complainant refusing to be examined—Acquittal of accused without examining complainant's other witnesses is wrong.*

Where the complainant declines to be examined, it is the duty of the Magistrate to proceed to take the evidence of his other witnesses before dismissing the complaint, although, in any event a strong preliminary presumption against the truth of the complainant's case would arise from his contumacious refusal to allow himself to be examined. An order of acquittal purporting to be passed under S. 245 (1) without so examining the other witnesses is a wrong order. [P 211 C 2]

(c) *Criminal P. C., S. 439—Ordinarily revision against acquittal will not be entertained.*

High Court will not ordinarily interfere with applications in revision against acquittal in view of the fact that the Legislature has provided a special channel for appeals against acquittals being filed. [P 212 C 1]

J. R. R. Cama—for Applicant.

R. N. Padhay—for Non-Applicants.

Order.—The applicant Damdoo has filed the present application for revision of the order of acquittal passed by the Bench of Honorary Magistrates, 2nd class, Sitabuldi, on 19-10-1926, in Criminal Case No. 306 of 1926. The present applicant filed a complaint of offences under Ss. 323, 147 and 506, I. P. C., against the seven non-applicants on 12-10-1926. On that date the complainant's preliminary statement was recorded and summons were issued to the complainant's witnesses and to the accused for 19-10-1926. Non-applicants 5 to 7 were on 19-10-1926 exempted from appearance under S. 205, Criminal P. C., and were allowed to be represented by a pleader. These three non-applicants, it may be stated, are the wives of Non-Applicants 1, 2 and 3. The applicant (complainant)

appears to have resented the order dispensing with the personal attendance of non-applicants 5 to 7 because when the Bench called on the complainant to go into the witness-box declined to do so on the said ground. The Magistrates thereupon held that there was no evidence against the accused and dismissed the complaint as frivolous and vexatious and in due course passed an order under S. 250, Criminal Procedure Code, ordering the complainant to pay Rs. 70/- compensation. That order has, I may say, already been set aside by the City Magistrate in appeal on 5-12-1926. The complainant has now come up here on revision on the allegation that the procedure of the Magistrates was incorrect.

In the first instance, it is urged that S. 242, Criminal Procedure Code, is an imperative provision and it was incumbent on the Magistrates to state the particulars of the offence to such accused at least as were present and to ask them to show cause why they should not be convicted. There was doubtless a technical irregularity here, although it is perfectly obvious on the facts of the present case that the Magistrates concluded from the fact of the accused being represented by a pleader that their position was one of denial against them. Applying the analogy of S. 535, Criminal Procedure Code, I am of opinion that, in the circumstances of the present case, no failure of justice resulted from the omission to take action under S. 242 of the Code. It is utterly impossible to assume in the circumstances of the present case that there was the slightest ground for supposing that the non-applicants would have pleaded guilty and, if the absence of a charge in a criminal case, where a charge should ordinarily be framed, does not necessarily render a trial invalid, a fortiori the omission to comply with the provisions of S. 242, Criminal Procedure Code, is nothing more than a curable irregularity.

The next point urged on behalf of the complainant-applicant is that in any event the Bench Magistrate was obliged to proceed to examine the complainant's witnesses, even although he declined to be examined himself. The decision in *Queen-Empress v. Sinnai Goundan* (1) was quoted in support of

this proposition. That case was, however, wholly different from the present one. In it the Magistrate dismissed the complaint and acquitted the accused merely on a consideration of the complainant's own evidence and refused to examine his witnesses. Here, the position was entirely different. The present applicant apparently because he was unable to drag the women (non-applicants 5 to 7) into Court, wrongly and improperly refused to allow himself to be examined in accordance with the provisions of sub-S. (1) of S. 244 of the Criminal Procedure Code. It has been suggested on behalf of the applicant on the strength of certain remarks made by Scott and Jardine, JJ., in *in re Ganesh Narayan Sathe* (2) that a complainant who refuses to be examined is not liable for an offence under S. 179, Indian Penal Code. The case is, in reality, of no help in this connexion because the learned Judges were apparently concerned with the preliminary examination of a complainant. Here, the complainant's preliminary examination was already over and process had issued as a result of the complaint combined with the said preliminary examination against the accused persons. In the circumstances, therefore, a strong probability emerges that the complainant was, in reality, liable for an offence under S. 179, Indian Penal Code, but I prefer to reserve my opinion on this point. In any event, however, even if the complainant declined to be examined, I think it was the duty of the Magistrates to have proceeded to take the evidence of his other witnesses under S. 242, Criminal Procedure Code, before dismissing the complaint, although, in any event, a strong preliminary presumption against the truth of the complainant's case would have arisen from his contumacious refusal to allow himself to be examined. I, therefore, am of opinion that the order of acquittal purporting to be passed under S. 245 (1), Criminal Procedure Code, was a wrong order.

In the peculiar circumstances of the case, however, I decline to order any further enquiry into the present complaint. In the first place, it has been the contumacious attitude of the complainant, which has, in reality, been responsible for the anomalous result of

(1) [1897] 20 Mad. 388=2 Weir 251.

(2) [1889] 13 Bom. 600.

the trial. Secondly, that contumacious attitude seems to have been entirely due to a vindictive wish on his part to drag the women accused in this trifling case into Court. Thirdly, while I am fully of opinion that the trial was illegal, this Court will not ordinarily interfere with applications against acquittals in view of the fact that the Legislature has provided a special channel for appeals against acquittals being filed. The principles on which this Court will interfere in exceptional cases by way of revision against orders of acquittal, have been fully considered and laid down by me elsewhere and it is needless to repeat them here. It must suffice to say that the present is a case where the complainant is deserving of not the slightest sympathy and where it would be an abuse of justice to allow him to carry his complaint any further in view of his attitude in the Magistrate's Court.

The application is accordingly dismissed.

G.B.

Application dismissed.

* A. I. R. 1927 Nagpur 212

HALLIFAX, A. J. C.

Sadashio Rao—Applicant.

v.

Umaji—Non-applicant.

Civil Revision No. 74 of 1925, Decided on 7th August 1925, from the order of the Sub-J., 1st Class, Chhindwara, D/- 6th November 1924.

* *Civil P. C., S. 151—Other remedies open—Power under S. 151 is not to be used.*

Section 151 of the Civil P.C., makes no law; it merely reminds Judges of what they ought to know already, that if they find the ordinary rules of procedure resulting in injustice in any case, whether by the force of circumstances or through the attempts of a party to get an unfair advantage out of them, those rules can be broken, but the Courts are not bound to break the rules and the power under S. 151 is to be used only when there is no other remedy open.

[P. 212, C. 1, 2]

G. L. Subhedar—for Appellant.

W. R. Puranik—for Non-applicant.

Judgment.—Section 151 of the Civil Procedure Code makes no law; it merely reminds Judges of what they ought to know already, that if they find the ordinary rules of procedure resulting in injustice in any case, whether by the force

of circumstances or through the attempts of a party to an unfair advantage of them those rules can be broken. What the section does not say, perhaps because it is even more obvious than what it does is that in the circumstances stated the Court is bound to break those rules. But the circumstances are that such a course is "necessary for the ends of justice or to prevent abuse of the process of the Court," that is to say, that those ends cannot be attained or that abuse cannot be prevented without breaking the rules.

In this case Shankar Rao, father of Sadashio Rao, who called on the lower Court to break the ordinary rules of procedure on his behalf and has now applied for revision of that Court's refusal to do so, obtained a preliminary decree for sale on a mortgage on the 12th of August 1922. On the 16th of August 1923 Shankar Rao's agent admitted in Court that the decree had been completely satisfied by a payment of money and delivery of grain, and full satisfaction of the decree was recorded. On the 22nd of September 1924 Sadashio Rao put in an application praying that his name might be substituted as decree-holder for that of his father, who was dead, and that the order recording the adjustment of the decree might be set aside because it had been obtained by fraud on an untrue statement made by his father's agent without his father's knowledge.

By asking that this should be done "under S. 151", which would be better put by saying "in the exercise of the power inherent in the Court which is mentioned in S. 151," the applicant admitted that he was asking the Court to break the ordinary rules of procedure and take a course forbidden by them. Before this could be done he would have to show that the injustice he alleged could not be prevented in some other way which did not involve a breach of those rules. It might possibly have sufficed if he had shown that there was no way within the rules which was not unreasonably difficult or costly, but that would be the very least condition which could justify a grant of his prayer.

Now it is admitted that he could file a suit for the cancellation of the order as obtained by fraud or apply for a review of it, and that possibly there are even other remedies open to him. Each of

these is perhaps a little more costly and troublesome than the extraordinary remedy for which he asks, but certainly cannot be said to be unreasonably so. The Court was therefore not only justified in refusing to break the rules it ordinarily has to follow, but was bound to do so. The application for revision is accordingly rejected. The parties have agreed that no order in respect of the costs of these proceedings need be passed.

D.D.

Application rejected.

A. I. R. 1927 Nagpur 213

FINDLAY, J. C.

Gangabai—Appellant.

v.

Hansidas and another—Respondents.

Second Appeal No. 138 of 1926, Decided on 3rd February 1927, from the judgment of the Dist. J., Nagpur, D/- 11th November 1925, in Civil Appeal No. 125 of 1925.

Fraud—Suit to set aside alienation—Plaintiff mere figure-head—Alienor real plaintiff—Relief should not be granted.

* Where in a suit for declaration that a certain alienation is invalid the plaintiff is merely a figure-head and the real plaintiff is the alienor himself who has caused the suit to be instituted for undoing his own act, no declaratory decree should be passed: *A. I. R. 1925 Lah. 24, Foll.*

[P. 213, C. 1, 2]

*S. K. Barlinge—for Appellant.**S. R. Mangrulkar—for Respondents.*

Judgment.—The only question in this case is as to the applicability of the principle laid down in *Dad v. Lal* (1). In that case two brothers had effected sales of the land. The minor son of one of the vendors brought declaratory suits contesting the alienation. Both the lower Courts held that the suits were collusive and were brought at the instance of the vendors who had been financing the litigation. The appellate Court—that of the District Judge—unlike the first Court, held that there had been no necessity for the alienations and remanded the case for a decision on the question of improvements. Meanwhile, on second appeal by Defendant 1 to the High Court, Martineau and Moti Sagar, JJ., held that as the minor in each of the suits was merely a figure-

head and the real plaintiff was the alienor himself, who had caused the suit to be instituted for the purpose of undoing his own act, no declaratory decree could be granted.

The Judge of the first Court in this case gave a definite finding that the present litigation had been started by the second defendant through the instrumentality of the plaintiff; that the whole suit was collusive and that the Defendant No. 2 was at the back of the litigation; and found also that even copies of Exhibits like P. 2 had been applied for by Defendant 2 and not by plaintiff and that important documents produced by plaintiff must have come from Defendant 2's possession. Even in Court, Defendant 2 had been instructing the pleader of the plaintiff: (cf. note on the deposition of Atmaram, D. W. 2). From these facts the first Court drew a highly justifiable inference of collusion between plaintiff and Defendant 2 and held that the suit, in effect, was one by Defendant 2 for undoing the results of his own action. The Judge of the lower appellate Court reversed the judgment of the Subordinate Judge on the sole ground that as the present plaintiff was a major, he could not be said to be a mere figure-head and, in his opinion, there was no reason why he should be deprived of his right to obtain the declaration he desired merely because Defendant 2 was "helping" him in the suit.

It is true that there was no specific pleading on the question of collusion, but, nevertheless, the evidence in the case did give rise to that question and it was duly considered by the Judge of the first Court. Moreover the District Judge has in his appellate judgment, clearly accepted the findings of fact arrived at by the first Court and has merely differed on the legal question whether the majority of the plaintiff makes any essential difference and suffices to take the case out of the purview of the obviously sound principle laid down in *Dad v. Lal* (1) quoted above. Evidence having been duly recorded and adjudicated upon on the question of collusion, it seems to me that we must accept the evidence as found and, for my own part, I can see no reason why the principle laid down in the said case should not apply *proprio vigore* in the present one also. Even although it is proved that the plaintiff

(1) *A. I. R. 1925 Lah. 24=5 Lah. 389.*

respondent had just attained majority shortly before the present suit was filed, the question involved is, in reality, one of fact. Was this suit, in reality, brought at the instance of the present plaintiff in his own interests or, on the other hand, is the plaintiff, in reality, only a figure-head, in a suit of which the second defendant is, in reality, responsible, his motive being to obtain a declaratory decree, which will have the effect of undoing his previous act? On the findings of fact of the lower Courts and on the evidence on record I have not the slightest hesitation in holding that the latter proposition is true of the present case, and, from this point of view, it seems to me that the principle laid down in the Lahore decision quoted can properly and reasonably be applied here also. It may be urged that it is contrary to equity and good conscience that the present plaintiff should thus be deprived of a remedy which he might otherwise have successfully used: but were he granted this relief, there would, in effect, be the greatest abuse of justice because it is only reasonable to believe that the real person who would derive benefit from the declaratory decree would ultimately be the Defendant No. 2 himself. Even from this equitable point of view, therefore, apart from the more strictly legal one, it seems to me only proper that the plaintiff should fail in his present suit.

The judgment and decree of the lower appellate Court are accordingly reversed and the plaintiff's suit is dismissed. The plaintiff must bear the defendant appellant's costs in all three Courts, while Defendant 2 will bear his own costs throughout.

D.D.

*Decree reversed.***A. I. R. 1927 Nagpur 214**

KINKHEDE, A. J. C.

Janardhan Kashinath Kasar—Defendant—Appellant.

v.

Janardhan Vishwanath Shastri and others—Plaintiff and Defendants—Respondents.

First Appeal No. 15-B of 1926, Decided on 12th February 1927, from the decree of the 1st Cl. Sub-J., Amraoti, D/- 23rd December 1925, in Civil Suit No. 34 of 1924.

Evidence Act, S. 65—Deed of relinquishment requiring registration not registered—Secondary evidence of the document is not admissible—Registration Act, S. 49.

The admitted existence of an unregistered written deed of relinquishment of one's interest requiring registration precludes the proof of the fact of the relinquishment by any secondary evidence as the primary evidence is itself inadmissible under S. 49, Registration Act: 33 Cal. 613, *Ref. to.* [P. 215, C. 1]

(b) *Hindu Law—Joint family—Relinquishment by a member of his interest found to be invalid—The member continues to be joint owner.*

Where a relinquishment by a member of a joint Hindu family is found to be invalid, the member continues to be the joint owner of the family property. He cannot be treated as dead in the eye of the law: 6 Bom. L. R. 925 and 14 N. L. R. 56 *Ref. to.* [P. 215, C. 1]

(c) *Equity—No equity arises in favour of transferee without value.*

There are no equities in favour of an alienee taking under a voluntary settlement as there are in favour of transferees for valuable consideration. The creation of a trust in favour of deity cannot be treated as one on an equal footing with a transfer for valuable consideration as the securing of merit by dedication of property to the service of God cannot be treated as forming good valuable consideration. [P. 215, C. 1]

(d) *Contract Act, S. 196—Thing void ab initio cannot be ratified.*

No amount of ratification can validate a thing which is void ab initio. [P. 215, C. 2]

A. V. Khare and W. R. Pendharkar—for Appellant.

Atmaram Bhagwant, W. R. Puranik and S. A. Ghadgay—for Respondent.

Judgment.—The success of this first appeal depends upon the question whether the trust created by Ragho Shastri was void or voidable. The trust is in the nature of a gift of the entire family property to the family deity with a right of management vested in a body of trustees all strangers to the family is beyond dispute. It could not be regarded as a family settlement for the simple reason that the same does not purport to make any provision for the author of the trust or for the matter of that, for the plaintiff-respondent. The validity or otherwise of the trust is made by the defendants to rest upon the disputed fact of a relinquishment of his interest by the present plaintiff as per writing dated 6-5-1918, which is not produced in original in the case. That writing is both unstamped and unregistered and as such it is inadmissible in evidence for the purpose for which registration is necessary, under S. 49 of the Registration Act. The admitted

existence of a writing precludes the proof of the fact of the relinquishment by any secondary evidence as the primary evidence is itself inadmissible. Had the defendant's case been that the release was by parol the matter would have been different: cf. *Imam Ali v. Baij Nath Ram Sahab* (1). The position therefore is that the defendants cannot legally prove the alleged relinquishment of his interest by the plaintiff. So that in the eyes of the law the plaintiff in spite of the so-called attempt at relinquishment continued to be the joint owner of the property of the family of which he was an undivided coparcener along with Ragho Shastri, and he could not be treated as dead on the analogy of the release referred to in *Wasantrao v. Anandrao* (2), quoted with approval in *Vinayak v. Laxman* (3).

The result therefore is that Ragho Shastri was not competent to make a voluntary settlement by way of trust in favour of the deity so as to bind the plaintiff. The transaction was a nullity and the estate remained wholly unaffected by it, as the learned J. C. pointed out in the aforesaid case at p. 60. C. also *Sabha Ram Teli v. Makdu* (4). There are no equities in favour of an alienee taking under a voluntary settlement as there are in favour of transferees for valuable consideration. I am not prepared to accept the contention of the appellant's pleader that the creation of the trust in dispute must be treated as one on an equal footing with a transfer for valuable consideration as the securing of merit by dedication of property to the service of God must also be treated as forming good valuable consideration though it cannot be measured in coin. If this argument were to prevail then even a gift will have to be treated as one with valuable consideration, which on the face of it is unsound. The only legitimate conclusion therefore is that the trust created by Defendant No. 1 Ragho Shastri was invalid or void ab initio and of no effect and did not in any way affect the plaintiff's interest. The dedication by Ragho Shastri, as also the so-called relinquishment by the plaintiff being thus of no avail, the plaintiff's

right of survivorship clothed him with full ownership of the entire property as soon as Defendant No. 1 Ragho Shastri relinquished the world and entered the order of Sanyasi on 1-9-1918.

The plaintiff repudiated the trust soon after in December 1918 and thus made his own determination to treat it as null and void clear and manifested it and actually communicated it to the opposite party by the service of notices on the so-called trustees. His subsequent treatment of the persons who professed to act as trustees, as such trustees, or for the matter of that his admission that they were trustees of the endowment does not improve their position in view of the fact that the trust was void and inoperative. If the trust had been voidable the subsequent conduct and dealings on plaintiff's part would have precluded him from repudiating it. But no amount of ratification can validate a thing, which is void ab initio. No question of estoppel or acquiescence in a void transaction can therefore arise in this case.

The result is that the lower Court's decree passed in plaintiff's favour must stand. The appeal therefore fails and is dismissed with costs.

As regards the plaintiff's cross-objection in respect of the mesne profits payable by defendants to plaintiff for the three years prior to the suit, I hold that plaintiff is entitled to the same on the view that the trust is void and plaintiff's acquiescence in it does not preclude him from asserting his rights as owner as against persons who are trespassers. As the Court below has directed enquiry as to profits from date of suit, it is hereby directed to also enquire into the past profits for three years prior to the suit and pass a decree for the same minus Rs. 400 already received by the plaintiff as per receipts Exs. D-1 and D-2 against the defendants as required by law. The cross-objection thus succeeds with costs.

G.B.

*Appeal dismissed.
Cross-objection allowed.*

(1) [1906] 33 Cal. 613=3 C. L. J. 576=10 C. W. N. 551.

(2) [1904] 6 Bom. L. R. 925.

(3) [1918] 14 N. L. R. 56=14 I. C. 51.

(4) [1899] 12 C. P. L. R. 63.

A. I. R. 1927 Nagpur 216

FINDLAY, J. C.

Bab'utmal—Decree-holder—Appellant.

v.

Madhoji and others—Defendants—Respondents.

Second Appeal No. 540 of 1925, Decided on 17th March 1927, from the order of the Dist. J., Bhandara, D/- 17th August 1925, in Civil Appeal No. 28 of 1925.

Execution—Decree binding—Mortgage decree directing sale of certain property—Objection as to its saleability cannot be taken in execution.

It is, no doubt, true that a judgment-debtor may, in certain cases, offer objection to the effect that certain property of his is not saleable in the case of a money decree, and such objection may, in certain circumstances, be urged even after the confirmation of the sale. The case of a mortgage decree is, however, different. An attack on such a mortgage decree to the effect that property ordered to be sold by it is not legally saleable, is, in reality, an attack upon the validity of the decree. The executing Court is bound to assume in this connexion that the decree has been made with jurisdiction and to allow an executing Court to hold that property specifically ordered to be sold by it was, in reality, not saleable, would amount to rendering the said decree so far a nullity. [P 216, C 2]

M. R. Bobde—for Appellant.

W. B. Pendharkar—for Respondents.

Judgment.—The facts of this case are somewhat peculiar. In Civil Suit No. 105 of 1922, the appellant decree-holder (Seth Bhabutmal) obtained against the defendants final decree for sale in the mortgage suit. The property concerned included four fields and the decree specifically ordered that the future crops of these fields should be sold until satisfaction of the mortgage debt. On 16-1-1925 the decree-holder applied for sale of the crop of the year 1922. The Judge of the executing Court held that a mortgage of future crops was tantamount to an agreement to assign the crops when they came into existence and he was of opinion that by virtue of the mere agreement the decree-holder could not proceed against the crops in the absence of any personal decree having been passed against the judgment-debtors. He accordingly rejected the execution application.

The decree-holder appealed to the Court of the District Judge, Bhandara, who was of opinion, relying on *Raghu-*

nath Rao v. Moti (1), that a mortgage of future crops was only of the nature of an agreement to mortgage such crops hereafter when the property comes into existence. As the decree did not direct the sale of any particular crops then in existence and was, in effect, a mere transcript of the relief claimed in the plaint, the Judge of the lower appellate Court was of opinion that the decree was a nullity in this connexion.

On behalf of the present applicant it has been urged that rightly or wrongly the decree ordered the sale of future crops, that these crops are now in existence and that the decree, therefore, must be executed in its entirety. In this connexion reliance has been placed on the decisions in *Parkhit v. Chamra* (2), *Lahore Bank v. Ghulam Jilani* (3), *Amrit Lal Seal v. Jagat Chandra Thakur* (4) and *Beharisingh v. Nawalsingh* (5).

For my own part, I am of opinion that the position of the appellant in this connexion is correct. It is, no doubt, true that a judgment-debtor may, in certain cases, offer objection to the effect that certain property of his is not saleable in the case of a money decree, and such objection may, in certain circumstances, be urged even after the confirmation of sale. The case of a mortgage decree is, however, in my opinion different. An attack on such a mortgage decree to the effect that property ordered to be sold by it is not legally saleable, is, in reality, an attack upon the validity of the decree. The executing Court was, in my opinion, bound to assume in this connexion that the decree had been made with jurisdiction and to allow an executing Court to hold that property specifically ordered to be sold by it was, in reality, not saleable, would, in my opinion, amount to rendering the said decree so far a nullity.

It is true that the property in question was not in existence on the date of the decree, but it is in existence now and is presumably ascertainable. It may be true that, in view of equity, a mortgage of future crops only amounts to an agreement to assign them when they came into existence. In the pre-

(1) [1897] 10 C. P. L. R. 87.

(2) [1902] 15 C. P. L. R. 131.

(3) A. I. R. 1924 Lah. 448=5 Lah. 54.

(4) A. I. R. 1926 Patna 202=4 Patna 696.

(5) A. I. R. 1924 Nag. 81=20 N. L. R. 24.

sent case, however, this aspect of the matter does not arise, because we have a definite decree that as soon as these crops had come into existence, they shall be sold in pursuance of the decree which founded on the terms of the mortgage. In the circumstances of the present case, therefore, it does not seem to me possible to go behind the terms of the decree and it is unnecessary to discuss at length the question of the legality or otherwise of a mortgage of future crops.

The order of the appellate Court, dated 13-8-1925, as well as that of the executing Court, dated 28-2-1925, are accordingly reversed and the case is remanded to the Court of the Subordinate Judge, second class, Balaghat, for disposal of the application for execution, dated 16-1-1925, on the merits in accordance with the above remarks. The respondents must bear the appellant's costs in this and in the lower appellate Court. Costs in the first Court will abide the result.

D.D.

Order reversed.

A. I. R. 1927 Nagpur 217

FINDLAY, J. C.

Balaji Sao and others—Plaintiffs—Appellants.

v.

Anand Prasad—Defendant—Respondent.

Appeal No. 1 of 1926, Decided on 4th March 1927, from the appellate decree of the Addl. Dist. J., Balaghat, D/- 13th November 1925.

Co-operative Societies Act, S. 44—Land Revenue Act, S. 128—Agriculturist's house is not exempt from sale for debts due to the Society.

Under S. 44, Co-operative Societies Act, read with S. 128, Land Revenue Act, an agriculturist's house as such is not exempt from sale for the recovery of debt due from him to the Society.

[P 218 C 2]

(b) Co-operative Societies Act, S. 42—Civil suit against purchaser for declaration that property sold was not liable to be sold is not barred.

A civil suit by a member of the Society against the purchaser for declaration that the property attached and sold for debt due from him was not liable to be sold is not barred by S. 42: 44 Bom. 582 and 17 C. P. L. R. 49, Ref.

[P 219 C 1]

(c) Provincial Insolvency Act, S. 28—Suit for declaration that certain property is exempt from sale is not barred.

A suit for declaration by plaintiff that his property is not liable to attachment and sale under S. 44 Co-operative Societies Act, is not barred by S. 28, by reason of his being adjudged an insolvent before the filing of the suit.

[P 219 C 2]

M. R. Bobde—for Appellants.

P. C. Dutt and V. D. Kale—for Respondent.

Judgment.—The plaintiffs, Balajisao Umrisao and Goresao, sued the liquidator, Hatta Kasari Society, Balaghat, and Anand Prasad, the present respondent, in the Court of the Subordinate Judge, 2nd Class, Balaghat, under the following circumstances. The plaintiffs claimed a declaration that the house and kothas specified in the plaint were exempt from attachment and sale and that the present respondent had not acquired any interest in them by virtue of his auction-purchase. The plaintiffs were members of the Hatta Kasari Society and were indebted as such to it to the extent of some Rs. 10,000. The society went into liquidation and the amount was ordered by the Registrar, Co-operative Societies, to be realized as arrears of land revenue. The first defendant, as a liquidator of the Society, accordingly attached the property through the revenue Court and had it sold by auction; it was purchased by the present respondent for Rs. 250. The plaintiff's case was that the subjects in question were exempt from attachment as being used for agricultural purposes under S. 60 (c) of the Civil P. C.

Defendant 1 denied that the property in question was used for agricultural purposes. He further pleaded that even if it was so used, it was not exempt from attachment and sale as this was effected under S. 128 of the Land Revenue Act. A further plea was offered that the Hatta Kasari Society had been brought under dissolution and liquidation under Ss. 39 and 42 of the Co-operative Societies Act and that, this being a matter connected with such dissolution and liquidation, no separate civil suit of the present kind was tenable. The present appellant as Defendant 2 adopted the same position.

On these and other pleas raised by the parties the Subordinate Judge gave the following findings:

(a) That the house and kothas in suit were used for agricultural purposes;

(b) that these subjects were exempt from attachment and sale ;

(c) that S. 42 of the Co-operative Societies Act did not bar the present suit ; and

(d) that, in spite of the fact that the plaintiffs had been adjudicated insolvents before bringing this suit, they were entitled to maintain it.

On these findings, the Subordinate Judge granted a decree declaring that the present appellants' house and kothas were exempt from attachment and sale and that the present respondent had not acquired any interest therein by reason of his auction-purchase.

The first defendant was, I may say, given up by the plaintiffs at an early stage of the litigation and we are no longer concerned with him.

The Defendant 2, Anand Prasad, appealed to the Court of the Additional District Judge, Balaghat. The Additional District Judge declined to disturb the finding of the first Court to the effect that the house and kothas were bona fide those of an agriculturist. He, however, held on other points that S. 128 of the Land Revenue Act was concerned with questions of procedure only and that the property in suit was not exempt from attachment as being that of an agriculturist. He further held that the present suit related to a matter connected with the dissolution of the Co-operative Society and was accordingly barred under S. 42 of the Act. The Judge of the lower appellate Court again held that the suit was untenable having regard to S. 28 of the Provincial Insolvency Act. On these findings, the plaintiffs' suit was dismissed and they have now come up here on second appeal.

I, therefore, start the present appeal from the basis that the house and kothas in suit were bona fide those of an agriculturist, and the first question for decision is whether in the particular circumstances of this case, these were, or were not, exempt from attachment. Under S. 44 of the Co-operative Societies Act (2 of 1912) the debt we are concerned with here was recoverable in the same manner as arrears of land revenue. Turning, therefore, to S. 128, Land Revenue Act, we find therein laid down the various processes by which such arrears can be recovered. As to the method of

recovery, we find in Cls. (f) and (g) thereof that the

estate, mahal or land, or the share or land of any co-sharer who has not paid the portion of the land revenue which, as between him and the other co-sharers, is payable by him ;

as well as any

immovable property belonging to the defaulter other than the land in respect of which the arrear has accrued,

can be sold in order to recover the arrears. Originally, the four processes mentioned in Cls. (d), (e), (f) and (g) of S. 128 could not be enforced without the previous sanction of the Financial Commissioner. By the Central Provinces Land Revenue (amendment) Act, 1923, this provision, which is contained in proviso (iii) to the section was modified so as to make the previous sanction of the Financial Commissioner only necessary in respect of the method of recovery specified in Cl. (e), viz., the annulment of the settlement of the estate, mahal or land in respect of which the arrear has accrued, and the taking of such estate, mahal or land under direct management.

The purchase of the property in question by Anand Prasad was made on the 19th September 1924, so that no question of the sanction of the Financial Commissioner necessarily, in reality, could arise in this connexion. The argument, however, offered on behalf of the present appellants is that, in view of S. 131, sub-S. (2), Land Revenue Act, the house and kothas concerned were necessarily exempt from attachment. The said provision reads as follows :

Attachments of immovable property under S. 128 shall be made, as nearly as may be, according to the law for the time being in force for the attachment of such property under the decree of a civil Court.

Reading S. 44 of the Co-operative Societies Act with S. 128 of the Land Revenue Act, it seems to me perfectly clear that the Legislature never intended that an agriculturist's house as such should be exempt. The only incidents of an agriculturist, which are exempt from attachment and sale under S. 128, are his implements of husbandry and certain cattle and seed. The present is an instance of legislation of reference and a very clear and substantive provision as to what may be sold or may not be contained in S. 128. Equally obviously, under that provision, the house of an agriculturist is not exempt from sale.

The attempt to invoke the aid of S. 60 of the Civil P. C., with the help of S. 131 of the Land Revenue Act, seems to me to have no sound basis. Section 131(2) is obviously not concerned with the properties which may be attached. What it does lay down is that in the case of whatever attachments of immovable property can be made under S. 128 such attachment shall, as nearly as may be, be conducted in accordance with the law applicable to attachment and sale by the ordinary civil Courts. Even if there were any flaw in the procedure as regards the method in which the attachment and sale was carried out, the remedy of the plaintiffs-appellants was by way of appeal in the revenue Courts : cf. S. 33 of the Land Revenue Act. I find myself, therefore, in full agreement with the Additional District Judge in his conclusion that the property in question was not exempt from attachment in the circumstances of the present case. This of itself necessarily disposes of the plaintiffs' appeal, but, nevertheless, I proceed to give my decision on the remaining points raised therein.

On the question whether the present suit was barred, having regard to the provisions contained in S. 42, sub-S.(6), Co-operative Societies Act, I find myself in disagreement with the Additional District Judge. The point is in reality, only of academic interest in view of the finding I have given above on the main question involved. If we can assume for a moment that the revenue authorities had acted ultra vires and had attached and sold the property which was not liable to be sold, I do not think that the present suit would have been barred, inasmuch as it is now merely a suit against the auction-purchaser (and not against the liquidator) for a declaration that no title has passed to the auction-purchaser under the sale. The suit, in its present form, does not seem to me to be a matter falling under S. 42 of the Co-operative Societies Act and only by a process of very strained reasoning, could the matter we are concerned with be said to be a matter connected with the dissolution of a registered society under the said Act. If the liquidator's act or order was clearly ultra vires, i. e., was outside the powers conferred on him by law as a liquidator, then obviously the civil Court can intervene, and if the

plaintiffs-appellants had succeeded in establishing that the property attached and sold was not liable under the law applicable to be so attached and sold, they would have been entitled to succeed in the present suit : cf. *Ganpat Ramrao v. Krishnadas Fadmanabh* (1) and *Chamru Sao Bania v. Tulsidin Singh* (2).

There remains the question whether the present suit was barred under S. 28 of the Provincial Insolvency Act. The present appellants were admittedly adjudicated insolvents before the filing of the present suit. If, however, the property in this suit had been held to have been exempt from attachment either under the Code of Civil Procedure or any other enactment applicable, such property would not have vested in the receiver or in the Court having regard to the provision contained in sub-S. (5) of S. 28, Provincial Insolvency Act. I disagree, therefore, with the view taken by the lower appellate Court, a view which seems to have ignored this particular provision contained in S. 22, and I am of opinion that the suit, on the allegations made in the plaint, did lie and was maintainable.

The finding, however, that the house and kothas in suit were attachable and liable to be sold, necessarily governs this appeal which is dismissed. The appellants must bear the respondent's costs. Costs in the lower Courts as already ordered.

G.B.

Appeal dismissed.

(1) [1919] 44 Bom. 582=57 I. C. 423=22 Bom. L. R. 732.

(2) [1904] 17 C. P. L. R. 49.

A. I. R. 1927 Nagpur 219

FINDLAY, J. C.

Laxmikant and others—Defendants—Applicants.

v.

Govindrao and others—Plaintiff and Defendants—Non-Applicants.

Misc. Judicial Application No. 57 of 1926, Decided on 14th February 1927, for transfer of Suit No. 13 of 1926, pending in the Addl. Dist. J., Nagpur's Court, to Bhandara Dist. J's Court.

Civil P. C., S. 24—Transfer—Convenience of parties is the basis of statutory jurisdiction.

In ordering transfer of a case the convenience of the parties is not merely a relevant but

also a material consideration, and, in effect, the convenience of the parties is at the basis of all the arrangement for statutory jurisdiction on the civil side: *A. I. R. 1922 All. 65, Foll.*

[P. 220 C. 2]

Where in a partition suit the greater part of the property is situated in B district:

Held: that this is a reason why it should be advantageous to both parties alike to have the suit tried in that district. The mere fact that the majority of the individual parties reside there, is not a very weighty consideration in favour of the transfer. That a party has engaged a counsel with heavy fees is a circumstance to be considered when ordering transfer of a case.

[P. 220 C. 2, P. 221 C. 1]

S. R. Mangrulkar and M. R. Pathak—for Applicants.

M. R. Bobde and M. R. Indurkar—for Non-Applicants.

Order.—This is an application for transfer of suit No. 13 of 1926 pending in the Court of the Additional District Judge, Nagpur, to the Court of the District Judge, Bhandara. The suit is one for partition and possession of moveable and immovable property of over three lacs in value, and, still at a preliminary stage. The present application was admittedly filed before the date of first hearing had come on in the lower Court. The grounds of the application are as follows:

In the first place, by much the greater part of the property concerned is situated in the Bhandara District, the only property situated in Nagpur, being a family house worth Rs. 15,000 and a small malik makbuza plot.

Secondly, the plaintiff and the majority of the defendants are residents of Bhandara.

Thirdly, it is alleged that, in connexion with the matters which are at issue in this case, the great majority of the witnesses will hail from Bhandara and it would be more convenient for the suit to be tried there. Under S. 17 of the Civil P. C. it is obvious that the suit can be tried either in Bhandara or in Nagpur. On behalf of the applicants it is urged that the balance of convenience is in favour of the suit being tried at Bhandara and that less expense to both parties alike would occur were this ordered, and I have been referred to the decisions in *Jotendronauth Mitter v. Raj Kristo Mitter* (1), *Mohabir Rahman v. Hazi Abdur Rahim* (2), and *Inayat Ullah Khan v. Nisar Ahmed Khan* (3), in this connexion as being instances where a High Court, on the grounds of the balance of convenience and expeditious disposal ordered transfer of the suit.

On behalf of the non-applicants it has been urged that no extraordinary ground for the transfer exists in the present instance. Where more than one forum is possible, it has been suggested

that the plaintiff's choice should be the dominant one. Apart from this, it has been urged that the balance of convenience is in favour of the suit proceeding in Nagpur. The plaintiff has engaged counsel in Nagpur and a substantial amount of fees has been paid here. It has also been suggested that Nagpur is connected, not only by rail, but by a regular motor service with Bhandara, and that, in those circumstances the Bhandara witnesses will suffer no material hardship in having to come to Nagpur. This consideration seems to me to cut both ways. If means of communication are easy and frequent between the two places, there ought to be no peculiar difficulty in the plaintiff being able to arrange for the counsel he has engaged in Nagpur to come to Bhandara.

It certainly seems to me in the present case, therefore, that the balance of convenience is in favour of the present suit being tried at Bhandara. I am aware of the decision of Knox, J., in *Madho Prasad v. Moti Chand* (4), that the mere convenience of the parties is not a good reason for such a transfer as I am asked to make, when the plaintiff, who, within the limits allowed by the Code of Civil Procedure, has a right to select the forum, objects to the transfer. For my own part, with all due deference, I prefer to follow the view taken by the Bench in *Inayat Ullah Khan v. Nisar Ahmad Khan* (3), quoted above. The convenience of the parties in a case like the present seems to me not merely a relevant, but also a material consideration, and in effect the convenience of the parties is at the basis of all the arrangement for statutory jurisdiction on the civil side. In the present instance the fact that the greater part of property is situated in the Bhandara District, is also, in my opinion, a reason why it should be advantageous to both parties alike to have the suit tried in that district. The mere fact that the majority of the individual parties reside there, is, in my opinion, not a very weighty consideration in favour of the transfer. On the other hand, practically the only real and valid objection to the transfer is the fact that the plaintiff has already engaged counsel in Nagpur.

(1) [1889] 16 Cal. 771.

(2) A. I. R. 1921 Cal. 210=48 Cal. 53.

(3) A. I. R. 1922 All. 65=44 All. 278.

(4) [1919] 41 All. 381=50 I. O. 863=17 A. L. J. 971.

There is no material on which it is possible to estimate the fees that have already been paid by the plaintiff to the counsel, but as, for the above reasons, I am of opinion that the suit should be transferred to Bhandara for trial. I think the plaintiff should receive some compensation in respect of any fees he may have paid in this connexion. I have no definite material on which to calculate these fees, but I am of opinion that, in the circumstances of the case, a sum of Rs. 300 would be a suitable sum. I accordingly order transfer of Suit No. 13 of 1926 from the Court of the Additional District Judge, Nagpur, to the Court of the District Judge, Bhandara. This order is subject to the previous payment by the present applicants to the non-applicant No. 1 (plaintiff) of Rs. 300 on account of costs as above mentioned. The costs of this application will be borne by the parties concerned.

D.D.

Case transferred.

A. I. R. 1927 Nagpur 221

HALLIFAX, A. J. C.

Mt. Nanhi Gond — Accused — Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 218 of 1926, Decided on 30th November 1926, from the judgment of the S. J., Hoshangabad, D/- 16th September 1926, in Sessions Trial No. 11 of 1926.

Criminal Trial—Punishment should be the least that will prevent repetition of crime by offender and will deter others.

The causing of merely retributive harm, whether by the community or the individual, is itself a crime. Punishment is in itself an evil, justified only by its prevention of greater evil, that is by its effects in deterring the offender from a repetition of the offence and in deterring others, by his example, from the commission of it. In each case also it must obviously be the least that will produce both these effects.

[P 221 C 2]

Judgment.—The appellant is a Gond widow, whose present age is recorded as fifty-five. She entered a detached house in a village in the late afternoon, by pulling off the padlock, which was apparently flimsy, and took some wheat from grain-bin inside and wrapped it up in a couple of rags that were there. The

value of the grain is two rupees and that of the rags a few annas only. The owner of the house returned while she was still inside and caught her. For this, mainly on account of her previous history, she has been sentenced to rigorous imprisonment for three years.

After recording a conviction on the plea of guilty, the learned Sessions Judge said in his judgment that under Cl. (b) of S. 310 of the Criminal P. C., he refrained from trying the charge of the previous convictions; he nevertheless proceeded at once to try it. Further, after finding all the alleged convictions proved, on Nanhi's own admission, he repeated that he declined to proceed against her on the charge of the previous convictions, and then proceeded to proceed against her on it, to the extent of passing a sentence of rigorous imprisonment for three years for an offence for which she would not otherwise have been sent to jail at all, but released under S. 562 of the Criminal P. C.

Nanhi has been already sentenced to rigorous imprisonment four times, always under S. 451 of the Indian Penal Code. The first sentence in April 1898 was of nine months, the next in August 1901 of two years, the third in April 1904 of four years, and the last in April 1910 of seven years. To the last sentence was added an order that she should report herself to the police for three years after her release under S. 565 of the Criminal P. C., a salutary provision which the learned Judge seems to have forgotten in this case, though the order is almost certainly the cause of the long interval between Nanhi's last release from jail and her present return to it.

The learned Judge has remarked that in this case sentence should not be retributive. The words clearly are misused, for otherwise they indicate that, in his opinion, sentences should be so in some cases. The causing of merely retributive harm, whether by the community or the individual, is itself a crime. Punishment is in itself an evil, justified only by its prevention of greater evil, that is by its effects in deterring the offender from a repetition of the offence and in deterring others, by his example, from the commission of it. In each case also it must obviously be the least that will produce both these effects.

In this case the secondary effect, that of deterring others, can almost be left out of consideration. The primary effect can be obtained by an order under S. 565 of the Criminal P. C., no less certainly than by sending the offender to jail. The sentence is accordingly reduced to one of rigorous imprisonment for three months, with an order under S. 565 of the Criminal P. C., that the appellant Nanhi Gondin shall after her release notify her residence and any change of residence or absence from her residence for a period of five years from the date of the expiry of the sentence now passed on her.

D.D.

Sentence reduced.

A. I. R. 1927 Nagpur 222

HALLIFAX AND MITCHELL, A. J. Cs.

Emperor—Appellant.

v.

Akia—Accused—Non-Applicant.

Criminal Reference No. 169-B of 1926, Decided on 1st November 1926, made by the S. J., Amraoti.

(a) *Evidence Act, S. 159—Statement of witness recorded should be proved as provided in S. 159.*

Statement of the person injured by the accused, made before certain villagers and recorded in full by the Patwari, is not to be proved by producing the written record of it. The proper method is that given in S. 159. [P 223 C 2]

(b) *Evidence Act, S. 25—"Police Officer" in S. 25 is wider than in Police Act (1861), S. 1.*

Primarily the term "Police Officer" in S. 25 of the Evidence Act means the same as it does in the Police Act but it can be extended beyond the definition in S. 1 of the Police Act to cover only those persons who, like Police Officers, coming within that definition, are so much more interested in obtaining convictions than any member of the community is, that they might possibly resort to improper means for doing so. [P 224 C 1, 2]

(c) *Evidence Act, S. 25—Police Patel in Berar is not Police Officer.*

A Police Patel in Berar cannot be regarded as a Police Officer for the purposes of S. 24: A. I. R. 1925 Nag. 340, *Dist. from*. [P 224 C 2]

G. P. Dick—for the Crown.

B. G. Kane and S. Y. Deshmukh—for Non-Applicant.

Judgment.—Akia Mahar was tried by the Sessions Judge of Amroati with a jury on a charge of having attempted to murder his wife Purni, and the unanimous verdict of the jury was that he

was not guilty. The learned Sessions Judge disagreed with this verdict and submitted the case to this Court under S. 307 of the Criminal Procedure Code, recording reasons for his opinion that Akia had been proved to be guilty of an offence punishable under S. 326 of the Indian Penal Code. The charge was one of an offence punishable under S. 307 of the Penal Code, but the learned Judge did not think the wounds caused to Purni were sufficiently serious to justify a conviction under that section.

The facts about which there is no dispute are as follows: The relations of Purni with her husband and his family were not happy, and she was made to live in an old house belonging to the family separated from its present residence by a narrow road. Akia continued to take his meals in the new house with the rest of the family but slept with Purni in the old house. On the morning of the 19th of June, on some slight quarrel, Akia struck his wife in the road outside the house, and apparently used the usual threats of killing her, which may have meant anything or nothing.

That night Akia and Purni slept in the enclosed courtyard of the old house as usual. At a time which seems to have been somewhere between 8 p.m. and 10 p.m. cries were heard coming from the house. Two of the witnesses who speak of them say they heard the voice of Purni calling out that she was being killed. The third, Rewia Mahar (P. W. 7), is recorded as saying: "I heard cries from Akia and Purni . . . The cries sounded like abuse".

Rewia hurried to the house and found the door fastened on the inside, so he climbed over a nine-foot wall and got in. He was followed by Sukia Mahar (P. W. 6) and Dajia Mahar (P. W. 5) each of whom got in by climbing over the same wall. Purni had an incised wound on the middle part of her right forearm, two scratches on her stomach and four punctured wounds on the left side of her body, one an inch below the left nipple, one on the left side of the stomach and two more, one above the other, below the left armpit. Dajia (D. W. 5) opened the door for her and she left the house. There was a knife somewhere in the courtyard, which Akia produced from under his cot a little later.

From these undisputed facts, and in the absence of any denial by Akia of having stabbed his wife to the three men who came into his house, it seems hardly possible in reason to draw any conclusion but that he attacked Purni with the knife and inflicted the wounds found on her. It is equally clear that, if he did and if she had died of her wounds, the inevitable conclusion would have been that he had intended to kill her. Indeed it is hard to imagine one person treating another in that way without a definite intention of killing that other. If therefore Akia did inflict those injuries on his wife, the offence of which he is guilty is one punishable under S. 307 of the Indian Penal Code, not under S. 326 as was held by the learned Sessions Judge. The matter is however of no consequence as the two sections prescribe exactly the same punishment.

Akia admits all the facts set out above but the version he gives of the whole incident is this: Purni demanded that he should allow her to visit her father which he had refused to do, and said it would be the worse for him if he did not. On his refusing a gain she began to stab herself with the knife. He could not see her in the darkness and did not know that she had a knife, but he, gathered from the sound, which he, describes as "khup khup", that she was stabbing herself, so he laid hold of her and took away the knife.

The facts already stated by themselves disprove this story. The three witnesses who climbed over the wall into the court-yard try to conceal Akia's guilt as much as possible but even their evidence makes it clear that the noise from the house was the voice of Purni saying she was being murdered; it is barely possible, but very unlikely, that she would raise such a cry as a part of a scheme for getting Akia hung by committing suicide, or at least getting him sent to prison by wounding herself.

In the next place Purni could not possibly wound herself on the middle of the right forearm unless she were left-handed nor wound herself both there and down the left side of her body unless she were ambi-dexterous, and there is no suggestion anywhere that she is either. Another strong indication of the untruth of the story is the improbability of Akia's knowing that she was stabbing herself

from the sound only, when he had no reason to suppose that she had a knife at all.

But there is much more than the facts that have been discussed so far. There is first of all the deposition of Purni herself. That is a plain account of how her husband attacked her with the knife as she lay on the ground beside his cot, and it fits all the other proved and admitted circumstances. - It is strongly corroborated by the full statement she made immediately afterwards to the Patel Shankar (P. W. 1), apparently in the presence of the assembled villagers, which was recorded in full by the Patwari. It may be mentioned that the method in which this statement has been proved, that is by means of the written record of it, is not correct. The proper method is that given in S. 159 of the Evidence Act.

There is further corroboration of the conclusion that Akia stabbed Purni and that she did stab herself in the evidence in respect of what Akia said (or did not say) to the three witnesses who climbed over the wall into the house. All of them say that nobody asked any question of either Akia or Purni and neither Akia or Purni said a word to them about what happened. That is so impossible that it only tends to prove that Akia said that his wife had annoyed him and he had attacked her with the knife; it is clear that the witnesses are concealing what he did say, and of the two things he might have said, that he had stabbed her and that she stabbed herself, the former is the only one they would attempt to conceal. They are friends of Akia's, and if he had said that his wife had wounded herself they would have told us so without hesitation. But even if their statements are true, they only go to prove Akia's guilt. If Purni had wounded herself Akia would certainly have told them so, and the fact that he did not would be proof that she did not wound herself; the only other possibility is that he wounded her.

There remains the question of the admissibility of proof of the confession made by the accused Akia very shortly after the incident to Shankar Maratha (P. W. No. 1) who is the Police Patel of the village. If that confession can be proved, it puts the guilt of Akia still further beyond doubt. In *Mechi v.*

Emperor (1) it was held by Baker, J. C., that the term "Police Officer" in S. 25 of the Evidence Act includes a Police Patel in Berar, because among the powers given to him and the duties imposed on him by statutory rules (printed at page 215 of the Berar Revenue Book Circular) are those of detecting and bringing offenders to justice, apprehending all persons whom a Police Officer could arrest without warrant, arresting persons suspected of having committed serious offences, and searching any dwelling house in which it is suspected that articles connected with serious offences are concealed.

Primarily the term "Police Officer" in S. 25 of the Evidence Act means the same as it does in the Police Act, where it is defined in S. 1 as including all persons enrolled under that Act. It is, however, impossible not to accept with respect the opinion of Garth, C. J., stated as long ago as 1876 in *Queen v. Hurrobole Chunder Ghose* (2), that the term "Police Officer" in S. 25 and the connected sections of the Evidence Act should be read not in any strict technical sense but according to its more comprehensive and popular meaning. The judgments in *Queen-Empress v. Bhima* (3) and *Queen-Empress v. Salem-ud-din Shaik* (4) are not authority for anything more than the propositions that a Police Patel in the Bombay Presidency and an official in Bengal, of whom we know nothing but that he is called a Chowkidar, are Police Officers within the meaning of Ss. 25 and 26 of the Evidence Act. No reason for the extent of the widening of the meaning of the term is stated in either case.

Now, the meaning of the term can only be extended so far as to fulfil the intention of the Legislature in enacting the section. It could not, for instance, be held that a person was intended to be regarded as a Police Officer for the purposes of that section merely because the word police appeared in his colloquial or official designation: the sweeper employed at a Police Station would ordinarily be called the Police sweeper, and among the duties of the civil Surgeon are many which in England

are performed by the Police Surgeon. Again, the holding of certain powers, ordinarily held only by Police Officers, is not a sufficient reason by itself, though the consequences that flow from it may be as will be shown. Otherwise it would be necessary to include within the scope of S. 25 of the Evidence Act several other persons who have never yet been regarded as so included, such as Officers of the Excise and Customs and Forests.

The intention of the Legislature is always a dangerous subject for speculation, but it seems fairly clear that, in the enactment of these particular provisions of the Evidence Act, it was to prevent the extortion of confessions and the invention of them, both methods of facilitating the procuring of convictions which Police Officers were considered likely to employ. The obtaining of a confession by improper means or proof of one by false evidence was rendered futile for the purposes of the trial by the exclusion of all confessions made to Police Officers from consideration. That involved the hindering of the course of justice by the exclusion of true and voluntary confessions also, but that had to be accepted as the lesser of the two evils.

The term "Police Officer" in S. 25 of the Evidence Act can, therefore, be extended beyond the definition in S. 1 of the Police Act to cover only those persons who, like Police Officers coming within that definition, are so much more interested in obtaining convictions than any member of the community is, that they might possibly resort to improper means for doing so. That class certainly does not include a Police Patel in Berar, any more than it does a Mukaddam or Kotwar in the Central Provinces. His powers and duties in respect of the investigation of offences do not make the conviction of suspected persons any more desirable, from his own point of view, than it would be if he had not got them. It cannot even be said that he is popularly regarded as an official of the Police or on the side of the Police. In popular estimation in Berar he is no more on the side of the Police than the Revenue Patel, he is a member of the village community and when the interests of the village clash, or are supposed to clash with those of the Police, he is

(1) A. I. R. 1925 Nag. 340.

(2) [1875] 1 Cal. 207=25 W. R. Cr. 36.

(3) [1893] 17 Bom. 485.

(4) [1899] 26 Cal. 569=3 C. W. N. 393.

regarded as being one of the villagers and as much against the Police as any of them, whether he is so or not.

For these reasons it must be held that a Police Patel in Berar cannot be regarded as a Police Officer for the purposes of S. 25 of the Evidence Act, and that proof of a confession made to him by an accused person is not excluded by that section.

Akia Mahar is accordingly found guilty of having attempted to murder his wife Purni and to have caused hurt to her in that attempt, and he is sentenced, under S. 307 of the Indian P. C., to rigorous imprisonment for five years.

D.D.

Order accordingly.

* A. I. R. 1927 Nagpur 225

FINDLAY, J. C.

Mahadeo Koshti—Complainant — Applicant.

v.

Narayan and others—Accused—Non-Applicants.

Criminal Revision No. 14 of 1927, Decided on 10th March 1927, from the order of the S. J., Nagpur, D/-21st October 1926, in Criminal Revision No. 29 of 1926.

* *Penal Code, Ss. 405 and 406*—Trust need not be in respect of lawful object.

The trust contemplated by Ss. 405 and 406 need not be in furtherance of a lawful object : 1 *Weir* 463, *Ref.* [P 225 C 2]

A. Razak—for Applicant.

A. N. Chorghade—for Non-Applicants.

Order.—The present applicant filed a complaint in the Court of the City Magistrate against the five non-applicants on the ground that they had conducted a sawda shop for dealing in American Futures in Nagpur City, that he had entrusted them with certain moneys with a view to sawda dealings and although he claimed to have fulfilled the conditions necessary for the successful termination of the deal, they had failed to pay him the amount due and were guilty of offences under Ss. 420 and 406, Indian Penal Code.

The City Magistrate dismissed the complaint on the ground that the acts

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alleged against the non-applicants only amounted to a breach of a wagering contract and did not constitute any criminal offence. The Sessions Judge, on an application for revision made to him, remarked that the complainant could have no remedy against the non-applicants in a civil Court and was also of opinion that no criminal offence had been committed.

For my own part, although it is obvious that the so-called contract or agreement between the parties was an illegal one, or one which any how would not be enforced in the civil Courts, the question of criminal responsibility seems to be on a wholly different footing. The opening words of S. 405, Indian Penal Code, are peculiarly wide, namely :

Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property.

The trust contemplated by Ss. 405 and 406 need not be in furtherance of a lawful object. The present case seems to me absolutely analogous to that of a stake-holder who misappropriates to his use the stakes deposited with him for a wager. It would, in my opinion, be no defence in a criminal prosecution, for an offence under S. 406, Indian Penal Code, for such a stake-holder to say that there was no legal contract to pay the stakes over to the winner. There was, in any event, a legal contract and obligation legally enforceable on the part of the stake-holder to repay the deposit to the person who had made the wager. If, therefore, instead of paying over the money to the winner, the stake-holder misappropriates it or converts it to his own use, I am unable to see why the fact that there was no legal contract to pay the stake-money over to the winner, should absolve the stake-holder from criminal liability if he misappropriates the amount himself. A case which presents some analogy to the present one is that of *Chinna Karuppa Muppan, in re* (1). The complainant there left his flock of sheep in possession of the accused in pursuance of an absolutely illegal purpose, viz., to prevent them from being taken in execution of a decree against him. The accused misappropriated some of the sheep to his own use. *Collins, C. J., and Parker, J., held that though*

(1) 1 *Weir* 465.

the trust created with regard to the sheep was for an illegal purpose, that was no sufficient answer to a charge under S. 406, Indian Penal Code. I am, therefore, of opinion that, on the allegations made in the present case, the lower Courts were wrong in summarily dismissing the complaint in the way they did, and also, on the allegations put forward in the complaint, there seems to me a case for enquiry as regards cheating.

The orders of the Sessions Judge and of the Sub-divisional Magistrate, dated 21st October 1926 and 7th July 1926 respectively, are accordingly set aside and the complaint case will be retried by such other 1st class Magistrate as the District Magistrate may select therefor.

D.D.

Order set aside.

A. I. R. 1927 Nagpur 226

FINDLAY, J. C.

Deoram Gujar and another—Defendants—Appellants.

v.

Biju Gujar—Plaintiff—Respondent.

First Appeal No. 128 of 1925, Decided on 10th February 1927, from the decree of the Sub-J., 1st Class, Bhandara, D/- 22nd October 1925, in Civil Suit No. 69 of 1924.

(a) *C. P. Tenancy Act (1920), S. 105—Transfer bad under general law—Jurisdiction of civil Court is not excluded.*

Section 12 of the Tenancy Act lays down certain limitations on the right of an occupancy tenant's transfer of his holding. If the said provision is transgressed, S. 13 allows "any person who, if he survived the tenant without nearer heirs, would inherit the holding, or the landlord of such tenant to apply" for a certain remedy in the revenue Court. In such a case the revenue Court has exclusive jurisdiction, and this would naturally cover a case of transfer which was good under the general law and only bad under the special provision of the tenancy law. But where the alleged transfer is bad under the general law the jurisdiction of the civil Court is not excluded: *A. I. R. 1925 Nag. 442, Foll.* [P 228 C 1]

(b) *Limitation Act, Art. 141—Starting point—C. P. Tenancy Act (1920), Sch. 2, Art. 1.*

In a suit by co-widow to set aside a gift of husband's property by her co-widow, the limitation begins to run from the date of co-widow's death. Art. 1 of the second schedule of the Tenancy Act does not apply. [P 228 C 1]

(c) *Adverse possession—Hindu Law—Reversioner.*

Possession adverse against widow is not so against reversioner: 13 C. P. L. R. 81, Ref. [P 228 C 2]

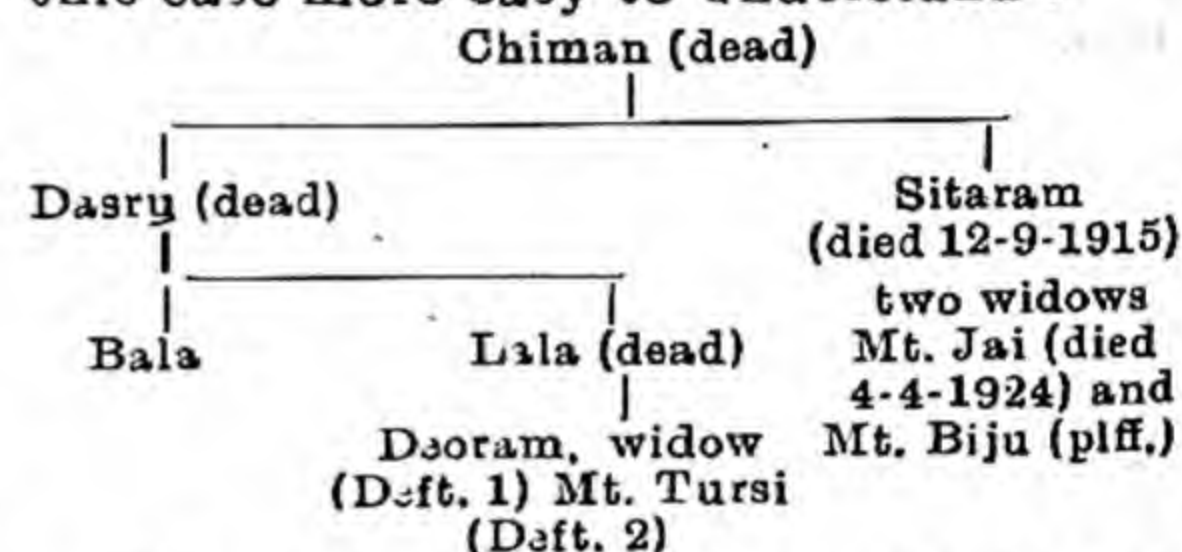
(d) *Transfer of Property Act, S. 19—Transfer of life interest in occupancy right is not void.*

Transfer of occupancy right in a field to a widow for life without power of transfer with remainder to a third person is not void and the widow cannot transfer the field even to the next possible heir. [P 229 C 2]

A. V. Khare, M. R. Bobde and W. B. Pendharkar—for Appellants.

D. T. Mangalmurti and V. D. Kolte—for Respondent.

Judgment.—The following genealogical tree may help to make the facts of this case more easy to understand:



The plaintiff, Mt. Biju, is the co-widow of Mt. Jai. The first and second defendants, Deoram and Mt. Tursi, are the son and widow of Lala respectively. The third defendant, Govinda, in the first Court was implicated as being in possession of field No. 102/1, one of the subjects in suit, but was discharged in the lower Court and I am not further concerned with him. Mt. Biju brought the present suit for the possession of land and moveables specified in the schedules attached to the plaint. Her case was that all this property was in possession of Mt. Jai, her co-widow, who died on 4th April 1924; that Mt. Jai had got possession of this property in pursuance of a compromise decree arrived at in Civil Suit No. 9 of 1916 in the Court of the District Judge, Bhandara (cf. copies of the judgment and decree D. 3 and D. 4); and that Mt. Jai remained in possession of the property until her death but that during her lifetime she executed a deed of gift in respect of the said property (Ex.D. 11, dated 3rd August 1920) in favour of Deoram, the minor son of the second defendant.

The position of the first two defendants was that the property in question originally belonged to Mt. Biju, the wife of Tima, and that she had gifted a third

of her property to Mt. Jai and the other two-thirds to one Sitaram Gujar. It was urged on behalf of these defendants that Mt. Jai was competent to make a valid gift of all the property in favour of Deoram who was the nearest reversionary heir to Sitaram. It was further urged that two applications of the plaintiff to the revenue Courts in connexion with the transfer of the said subjects had been dismissed and that the present suit did not lie in the civil Courts.

On behalf of the plaintiff, in his rejoinder, it was admitted that a compromise decree, in Civil Suit No. 9 of 1916, had been passed but it was pleaded that Mt. Jai had made a statement before the District Judge in the said suit distinctly admitting that neither she nor Mt. Biju should have any power to alienate their husband's property. It was, moreover, pointed out under that deed of gift executed by Mt. Biju in favour of Mt. Jai (cf. P. 1) a distinct clause appeared restraining the donee from making any transfer of the property gifted and also stating that Sitaram and his children would succeed to the said property on the death of Mt. Jai.

On the issues which the Subordinate Judge framed on these and connected pleadings, he came to the following findings:

(a) That the deed of gift (D. 11), dated 3rd August 1920, was genuine and was properly attested and that, as Mt. Tursi and Deoram lived with Mt. Jai, they altogether were in enjoyment of the property covered by the deed of gift, but there was no formal delivery of possession.

(b) That Mt. Jai could only convey her life interest to Defendant 1, Deoram, under the said deed of gift.

(c) That the civil Court had jurisdiction to entertain the present suit.

(d) That Mt. Biju is entitled to the property of Mt. Jai irrespective of any agreement arrived at in Civil Suit No. 9 of 1916.

Finally, in para. 11 of his judgment, the Subordinate Judge held that Deoram had not in fact obtained possession of the occupancy lands or any other property under the deed of gift; that Mt. Jai's name continued to be shown in respect of lands in the village papers up to 1924; and the Subordinate Judge was further of opinion that, even on the

assumption that Mt. Jai was the absolute owner of the land, the plaintiff was entitled to succeed in preference to a collateral heir like Deoram, Defendant No. 1.

Decree for possession of the property was accordingly granted against Defendants Nos. 1 and 2.

An important contention raised on behalf of the present appellants is that in the present suit the jurisdiction of the civil Court was barred under S. 105 of the C. P. Tenancy Act, 1920. Reliance was placed in this connexion on the decisions in *Jagannath v. Khuba* (1) and *Fakira v. Ramkisan* (2). It is urged accordingly that the revenue Courts had exclusive jurisdiction in this matter and that, therefore, the jurisdiction of the civil Courts is barred.

In this connexion it is pertinent to look with some care into the actual nature of the proceedings in the revenue Court. Mt. Biju's application was filed on 23rd February 1921 in the Court of the Sub-divisional Officer, Bhandara, cf. D. 8. The application purported to be one under S. 13 of the Tenancy Act of 1920 and alleged that the transfer of the occupancy fields under the deed of gift, dated 3rd August 1920, was in contravention of S. 12 *idem*. The Sub-divisional Officer's order in this proceeding is to be found in Ex. P. 3. He held that there had been no actual transfer of possession and, that, in any event, the transfer to Deoram was not a legally maintainable one, as, at any rate, Bala was a nearer heir. Holding, therefore that the application was a premature one, which did not come within the purview of S. 13, he dismissed it. An appeal followed to the Court of the Deputy Commissioner, Bhandara: (cf. copy of the order D. 12). The Deputy Commissioner pointed out that the Sub-divisional Officer was wrong in supposing that the word "transfer" in S. 12 of the Tenancy Act 1920, necessarily implied also the delivery of possession. He further pointed out that the Sub-divisional Officer was in error in the interpretation he put upon S. 12; that the said provision obviously gave the tenant a greater latitude in making the transfers and that, in the circumstances, Mt. Jai's transfer was not in contravention of S. 12 of the Act.

(1) [1909] 5 N. L. R. 176=4 I. C. 795.

(2) A. I. R. 1925 Nag. 277=21 N. L. R. 25.

Mt. Biju was accordingly referred to the civil Courts for her remedy. This order was confirmed by the Commissioner, Nagpur, (cf. copy of his order, dated 7th November 1921, D. 5).

For my own part, an obvious fallacy seems in my opinion to underlie the argument advanced on behalf of the appellants in this connexion. S. 12 of the Tenancy Act lays down certain limitations on the right of an occupancy tenant's transfer of his holding. If the said provision is transgressed, S. 13 allows

any person who, if he survived the tenant without nearer heirs, would inherit the holding, or the landlord of such tenant to apply

for a certain remedy in the revenue Court. In such a case the revenue Court has exclusive jurisdiction, and this would naturally cover a case of transfer which was good under the general law and only bad under the special provision of the tenancy law just referred to. Here, the plaintiff's case is that the transfer is bad under the general law and, in those circumstances, it seems to me that the jurisdiction of the civil Court is clearly not excluded. I find myself in this connexion in full agreement with the judgment of Hallifax, A. J. C., in *Tijan v. Gopi* (3), and I am unable to find any ground for holding that the jurisdiction of the civil Court is ousted in the present case by the provision contained in S. 105 of the Tenancy Act.

It has next been urged that the present suit was barred by limitation, inasmuch as Mt. Biju was excluded from the holding by the mere execution of the deed of gift, dated 3rd August 1920, or, on the very best point of view for her, from the plaintiff's application to the revenue Court, dated 23rd February 1921 (D. 8). The present suit was filed on 16th October 1924, and it is urged that the limitation applicable is the two years' rule laid down in Art. 1 of the second schedule to the Tenancy Act. For my own part, it seems clear to me that the said provision has no applicability whatever. The plaintiff's cause of action clearly only arose on the death of Mt. Jai, viz., on 4th April 1924. Her case was that she and Mt. Jai were entitled to enjoy the property according to the compromise arrived at in the civil suit and that under that compromise she

was entitled to come in to the other half of the property on the death of Mt. Jai. In these circumstances, it seems clear to me that the cause of action, on which the plaintiff relies, did not come into being until Mt. Jai's death. Even if there had been any question of adverse possession as against Mt. Jai, it does not run against the reversioner: cf. *Rampershad Tiwari v. Anandilal* (4).

I now proceed to examine the deed of gift (P. 1), dated 18-12-1893, by Mt. Biju, widow of Tima, in favour of Mt. Jai, her niece. That deed laid down among other things the following conditions:

(1) There was a restrictive clause by which Mt. Jai was to enjoy the property during her lifetime and on her death on her husband Sitaram or his children were to enjoy it. Clearly there was no power of sale or gift to rest in Mt. Jai.

(2) The property gifted was stated to be stridhan and Mt. Jai was, it will be remembered, the daughter of the sister's donor.

(3) The motive for the gift was that Mt. Jai was being of use and rendering service to the donor who was then presumably an aged woman.

The remaining property in suit was what Mt. Biju gifted to Sitaram. Sitaram died on 12-9-1915 and Civil Suit 9 of 1916, which, as I have already shown, was compromised, followed, Mt. Jai's case being that she desired to obtain $\frac{1}{2}$ share of the property gifted to Sitaram, i. e., the property in Schedule A minus the 4 old numbers gifted to Mt. Jai.

Much has been made of the fact that neither the judgment nor the compromise decree in Civil Suit 9 of 1916 mentions the fact that Mt. Jai was to have no power to alienate the property. I do not see that this was remarkable in the circumstances. In the suit in question Mt. Jai desired in the alternative joint possession or partition of the property concerned—what was desired in effect was to arrive at a *modus vivendi* as regards the enjoyment of the property by the two co-widows. What is of importance is that Mt. Jai, in the course of the compromise proceedings, made a clear statement that neither she nor the co-widow were to have any power to alienate the property and that the compromise was not to affect their respective rights of survivorship. (cf. P. 4).

On 3-8-1920 Mt. Jai executed the deed of gift (D. 11) in favour of Deoram, the ostensible motive, therefore, being that

(3) A. I. R. 1925 Nag. 442.

(4) [1900] 13 C. P. L. R. 81.

Deoram was like her own son. I now come to the question of the nature of the interest created in favour of Sitaram and his offspring under the deed of gift (P. 1). The case for the defendants-appellants Deoram and Mt. Tursi is that the co-widow the present plaintiff respondent Mt. Biju has no locus standi in this connexion, that, even if there was a restriction, that was purely a question between the donor and the donee or any one claiming through the donor, that plaintiff is no heir of the donor and that in any event plaintiff-respondent has no case, so far as the property included in P. 1 is concerned, to question the validity of the gift evidenced by D. 11. Plaintiff-respondent's position in this connexion is that Mt. Jai had only an interest for life conferred on her under P. 1, that she was debarred from alienating the property and that further P. 1 created a vested interest in favour of Sitaram and his offspring that in those circumstances, having regard to the law as laid down in S. 19 of the Transfer of Property Act, the previous death of Sitaram is immaterial and the property will follow the line of Sitaram. For my own part, I find it impossible to accept the position of the appellants in this connexion, viz., that because Sitaram died without children, the disposition failed and the property vested where it halted, viz., with Mt. Jai. Reading the will as a whole, it seems clear to me that a vested interest was created in favour of Sitaram or his children. Mt. Jai's death was an event that must happen and, even although Sitaram had no children, the interest remained vested in him and as such passed on his death to his representatives. I am of opinion, therefore, that the same incidents apply both to the property included in P. 1 as well as to the other subjects with which I am concerned in this case.

It has been suggested on behalf of the appellants that in any event the intention of the restriction was that the property should come to the issue of Sitaram, that Deoram and his father were brought up by Mt. Jai and that in the circumstances the spirit, if not the complete letter, of P. 1 would be observed by recognising Deoram's right to the property. This seems to me a strained argument which does not require seri-

ous discussion and the point was not indeed seriously pressed by the counsel for appellants.

It has again been urged that the restriction contained in P. 1 was void in view of the Tenancy Act of these Provinces; cf. *Gangaram v. Yashodabai* (5), *Bhikaji v. Tukaram* (6) and *Ghanya v. Ukund Rao* (7). The tenures in the Tenancy Act are, it is said, exhaustive, while Mt. Jai was under P. 1 an occupancy tenant of a limited character with special incidents attached to her tenancy. I am asked, therefore, to hold that the restriction should be ignored and that Mt. Jai became an ordinary tenant, pure and simple, and had such rights of tenancy as any other occupancy tenant had. I do not think that there is any sound basis for this contention. Mt. Jai was for the time being a pure occupancy tenant but she was given no absolute interest in the fields. No new kind of tenancy was created by the restriction: Mt. Jai was an occupancy tenant, pure and simple, during her life subject to the condition that she was not to alienate and it follows that she could not make a valid transfer of the holding to Deoram, even although he was under the Special Tenancy Law a possible heir who could otherwise have come in. S. 11 of the Transfer of Property Act cannot benefit appellants in this connexion because no absolute interest was created in favour of Mt. Jai.

Finally, I may add that even apart from the restriction on alienation included in P. 1, and from the undoubted understanding between the widows as evidenced by Mt. Jai's statement before the Court (P. 4), subsequent to which the compromise decree in Civil Suit No. 4 of 1916 (D. 4) issued the right of survivorship could not, in my opinion, have been defeated under the ordinary Hindu Law applicable: cf. Mayne's Hindu Law, 9th Edition, para. 553. The present alienation by Mt. Jai was clearly not one which could hold good beyond her lifetime.

I may add that it has been suggested on behalf of appellants that anyhow the movable property included in P. 1 formed Mt. Jai's stridhan and could not go by survivorship. The decree men-

(5) [1917] 13 N. L. R. 163=42 I. C. 261.

(6) [1911] 7 N. L. R. 17=10 I. C. 697.

(7) [1908] 4 N. L. R. 9.

tioned only six bullocks and Rs. 400 cash as the husband's property (cf. D. 4), having regard to the terms of P. 1 already discussed I do not think there is any substance in this contention.

The appeal accordingly fails and is dismissed. Appellant must bear the respondent's costs. Costs in the lower Courts as already ordered.

D.D.

Appeal dismissed.

A. I. R. 1927 Nagpur 230

KINKHEDE, A. J. C.

Dawlat—Plaintiff—Appellant.

v.

Nagorao—Defendant—Respondent.

Appeal No. 155-B of 1922, Decided on 5th December 1923, from the appellate decree of the Dist. J., Amraoti, D/- 30th November 1921.

(a) Hindu Law—Widow—Surrender by—Surrender must be of total interest and bona fide—Reservation of annuity in her favour does not negative self-effacement.

The surrender by a widow of her life interest in favour of the next reversioner to be valid must be total not partial. It must be a bona fide surrender, not a device to divide the estate with the reversioners: 42 *Mad.* 523 (P. C.); *A. I. R.* 1919 P. C. 75; *A. I. R.* 1924 *All.* 166; and *A. I. R.* 1921 P. C. 107, *Rel. on.* [P 232, C 1]

The reservation of an annuity does not necessarily negative the intention of self-effacement which is so very essential for accelerating the succession; *A. I. R.* 1919 P. C. 75, *Rel. on.*

[P 232, C 1]

But where there is conduct on the part of the widow which shows that the surrender was not acted upon by her, and that she did not abandon possession, it may very well be inferred that there was not such complete self-effacement and abandonment as would preclude her from asserting any further claim to the estate in the event of grantee pre-deceasing her. [P 232, C 1, 2]

(b) Practice—Subsequent Events—Events happening pending litigation can be considered.

Courts can take cognizance of events which happen during the pendency of litigation, and mould the relief to be granted with reference to such events, so as to shorten the litigation.

[P 232, C 2]

II. S. Gour and A. V. Khare — for Appellant.

D. T. Mangalmoorti— for Respondent.

Judgment.—This is an appeal by the plaintiff against the dismissal of his claim by both the Courts below. The plaintiff claims possession of the field in dispute on the basis of a sale-deed executed in his favour on 5th June 1919

(Ex. P-5) by one Deoman. His case is that his vendor succeeded to the field as an heir to his wife Mt. Reni who died in June 1916. Mt. Reni in her turn got the field from the Defendant No. 1 (Gangoo), her mother, by means of a document dated 5th June 1909 (Ex. P-1), in consideration of her undertaking to pay Rs. 50 annually to her for maintenance during her lifetime. The plaintiff asserts that Mt. Reni was an absolute owner of the field by virtue of the deed (Ex. P-1). That the Defendant No. 1 without any right took forcible possession of the land and was about to remove the crops standing on the land. The suit is therefore one for possession and also for injunction to restrain the defendant from removing the crops. The Defendants Nos. 2 and 3 were impleaded as co-defendants on the ground that they were lessees of Defendant No. 1 and had been helping the latter to keep the plaintiff out of possession. The Defendant No. 1, while admitting the execution of the document dated the 5th June 1909 (Ex. P-1), contended amongst other things that the field belonged to her husband Narain and she herself had a widow's interest therein. She stated that besides Mt. Reni she had another daughter by name Saru. That besides the field in suit she inherited one house and two other fields situated at monza Uprai; that she had reserved to herself a house and one field No. 69, and relinquished only one field in suit to her daughter Reni, and not the whole inheritance. That the relinquishment not being of the whole of the property, and not being in favour of both the daughters was not valid and therefore Reni could not obtain absolute interest under the document and, in any case, her right to succeed to the estate in case Reni predeceased her could not pass under the said deed. That the property therefore after Reni's death reverted to her as the heir of her husband. The alleged sale by Deoman, and the alleged dispossession, as also the extent of the net income as stated by the plaintiff were denied. The plaintiff in his reply admitted that Defendant No. 1 had another daughter by name Saru, but contended that Defendant No. 1 surrendered her whole interest in favour of her two daughters Reni and Saru and that Defendant No. 1 did not

keep to herself any field or other property. And that even if she had kept any for herself it could not have invalidated the relinquishment. It was urged that it was not open to Defendant No. 1 to question her own act. It was asserted that Reni had absolute interest in the property and that Deoman was her lawful heir and therefore had a right to transfer the field in suit to plaintiff. It will thus be seen that the plaintiff's title to the land in suit hinges upon the decision of the question whether the interest created in favour of Reni by the document dated 5th June 1909 was an absolute or a limited one. The Court of first instance dismissed the suit on the ground that the daughter Reni, having predeceased the mother, could not become a fresh stock of descent as the property was not the stridhan property of the daughter and must therefore revert to the heir of the last male holder, i. e., to Defendant No. 1.

Some of the points were left undecided. On appeal the case was remanded for decision of the points left undecided and of some additional issues. The finding relevant to the decision of this 2nd appeal as given after remand are that the document dated 5th June 1909 (Ex. P-1) executed in favour of Reni could not be regarded as surrender of the widow's estate by Defendant No. 1, because it did not relate to the entire estate held by her, and was not in favour of the entire body of the next reversionary heirs. That even if the document (Ex. P-1) in favour of Reni and the similar one in favour of Saru (which is not before us) be regarded as together constituting one transaction still Survey No. 69 and the house not having been included in them, the transaction could not operate as a surrender of the whole of the inheritance so as to accelerate the succession in favour of the daughters. That the document at the most was a gift by a widow and as such could not be valid under Hindu Law.

The District Judge confirmed the findings of the Court of first instance and held that Reni did not become an absolute owner of the property gifted to her by Gangoo; that the property still remained the property of her father (Narayan) and on Reni's death reverted to the next heir of Narayan, i. e., to Defendant No. 1 herself; and that Reni's

husband could not succeed to it as her heir. It was contended before the District Judge that even if the gift was not absolutely valid, still it was valid at any rate for the lifetime of Gangoo. He confirmed the dismissal of the suit and dismissed the appeal.

Since the filing of this appeal Mt. Gangoo, Defendant No. 1, died, and in her place Nagorao, her nephew, has been substituted as Respondent No. 1. Before me it is contended that the document dated 5th June 1909 (Ex. P-1), which is styled a "Farkat," is either a surrender or an alienation for consideration. That reading Ex. P-1 along with Ex. P-9 (which is an extract from the Record of Rights and which mentions that a similar document in respect of Field No. 91 was executed in favour of Saru on 5th June 1909) the whole transaction amounts to an out and out surrender of the entire inheritance in favour of the defendant's reversionary heirs, i. e., of both the daughters. That under the Bombay School of Hindu Law applicable to Berar daughters take absolute interest in the inheritance. That the property was therefore stridhan in the hands of Mt. Reni and passed to her husband as such. That treating it as an alienation it was for consideration and as such was binding on Defendant No. 1 for her lifetime at any rate, and that if the relief be granted on the basis of the facts as they existed at the date of the suit, the plaintiff was entitled to a decree as prayed for.

On behalf of respondents it is, however, contended that for all intents and purposes, the transaction was nothing more than a gift by a widow in respect of the inherited property. Mt. Reni could not therefore acquire thereunder any interest which would, on her death, descend to her own heir. That treated as an alienation for consideration the transaction could not be supported for want of legal necessity, as against the Respondent No. 1 who has become the actual reversionary heir on Gangoo's death, the other daughter Saru being already dead. That inasmuch as the transaction does not relate to the whole of the property and was not in favour of the two daughters, i. e., of the whole body of the reversionary heirs, there could be no acceleration of succession in favour of Reni so as to make the field her stridhan. It is also contended that the reservation of the

annuity pointed to an intention not to part with the entire interest in favour of Reni.

After carefully considering the several aspects placed before me and the law bearing on the questions involved, I am strongly of opinion that the document dated 5th June 1909 (Ex. P-1) cannot operate as an acceleration of succession in favour of the next heir. The obvious reason for it is that the document dated 5th June 1909 in favour of Saru (referred to in Ex. P-9) does not cover the whole of the interest in the whole of the property comprised in the inheritance as found concurrently by both the Courts: see *Rangasami Gounden v. Nachiappa Gounden* (1), *Bhagwat Koer v. Dhanukdhari Prasad Singh* (2), *Suryarao Rao Bahadur Garu v. Suryanarayana Jagapathi Bahadur Garu* (3) and *Sartaji v. Ramjas* (4). The surrender must be total not partial. It must be a bona fide surrender, not a device to divide the estate with the reversioners: *Sureshwar Misser v. Maheshrani Misrain* (5).

The learned counsel for the plaintiff-appellant had to admit that the Field No. 69 and the house comprised in the inheritance was outside its scope. I am further of opinion that upon a proper construction of the document (Ex. P-1) all that Gangoo purported to have done was to transfer her life-interest in only a part of the inheritance, in favour of Reni, one of her daughters, in consideration of her getting maintenance from her. The reservation of the annuity does not necessarily negative the intention of self-effacement which is so very essential for accelerating the succession: *Bhagwat Koer v. Dhanukdhari Prashad Singh* (2). But where, as here, there is conduct on the part of the widow which shows that the surrender was not acted upon by her, and that she did not abandon possession but herself leased out the field and appropriated the profits and maintained the daughter instead of being maintained by her—see *kabuliayats* Exs. D-2 to D-9,—it may very well be inferred that there was not such complete effacement of self and abandonment of the hold on the

said field by Gangoo as could have precluded her from asserting any further claim to the estate which the contingency of the grantee's earlier death has brought into existence for her: *Bhagwat Koer v. Dhanukdhari Prasad Singh* (2). If we look to Ex. P-10 we find that Reni lived with Gangoo, as she could not pull on well with her husband, and hence Gangoo had to arrange for Reni's maintenance. Judged in the light of this object of the grant, or even by the purpose recited in the document, namely, of making an arrangement, whereby Gangoo was to get maintenance for her lifetime, I do not think Gangoo could have at all intended either to benefit Reni's husband who did not discharge his duty as a husband towards her and maintain her, or to give up her rights to the property in the event of Reni, with whom or for whom she made the arrangement for maintenance, dying during her own lifetime. If at all the surrender could under such circumstance be said to have been intended to be given effect to, it was nothing more than a device to divide the inheritance with one of the reversioners for the time being.

Whatever considerations might have arisen by way of a personal estoppel as against Gangoo on the ground that she could not derogate from her own grant, they have, owing to her death, disappeared and cannot now be pressed, at any rate as against the present respondent Nagorao, who gets the property from the last maleholder. Courts can take cognizance of events which happen during the pendency of litigation, and mould the relief to be granted with reference to such events, so as to shorten the litigation. In this view of the case, even if the appellant may have had any equities as against Gangoo, he has none as against Nagorao, the present respondent. I, therefore, dismiss the appeal with costs. Costs in the Courts below will be paid as already ordered.

G.B.

Appeal dismissed.

(1) [1919] 42 Mad. 523=50 I. C. 498=46 I. A. 72 (P. C.).

(2) A. I. R. 1919 P. C. 75=47 Cal. 466 (P. C.).

(3) A. I. R. 1921 Mad. 332.

(4) A. I. R. 1924 All. 166=46 All. 59.

(5) A. I. R. 1921 P. C. 107=48 Cal. 100 (P. C.).

A. I. R. 1927 Nagpur 233

KINKHEDE, A. J. C.

Punjraj—Plaintiff—Appellant.

v.

Kalusa—Defendant—Respondent.

Second Appeal No. 324 of 1926, Decided on 9th April 1927, from the decision of the Dist. J., Nimar, D/- 27th January 1926, in Civil Appeal No. 118 of 1925.

Specific Relief Act, S. 21—Contract for sale of land — Performance dependent upon will of third party—Specific performance should not be granted.

In a suit for specific performance of a contract of sale and alternatively for refund of consideration, if the performance depends upon volition of a person not party to the suit, a decree for specific performance should not be granted.

[P 233 C 2]

S. B. Gokhale—for Appellant.*P. C. Dutt*—for Respondent.

Judgment.—This appeal is by plaintiff whose claim for specific performance of contract of sale of abadi site has been decreed in the Courts below. Rightly enough the plaintiff is not satisfied with this decree and wants in lieu thereof a decree granting the alternative relief of the refund of consideration in view of the finding of the lower appellate Court that under the terms of the agreement of sale it was the plaintiff's own obligation and not of the defendant to secure the consent of the landlord to the sale. No doubt, the plaintiff has put forward the alternative claim for refund of consideration, but that is expressly made contingent upon the Court's refusing to decree specific performance of contract of sale, or holding the contract as unproved. One of these contingencies has really happened. The Court has decreed the specific performance by holding the contract of sale proved. Since, however, it is the plaintiff's contention that the proof of contract of sale comprised within its scope proof of the special term about the defendant's obligation to secure the landlord's permission to transfer, certainly, there is a failure to prove the contract as set forth in the plaint. The plaintiff did not want a decree for specific performance in spite of his own failure to prove that it was the defendant's obligation to secure the consent of the landlord, for the obvious reason that the subject-matter of the sale, before vesting in him in absolute right would subject him to the obligation to procure

the landlord's consent, a circumstance which must necessarily lessen its value to the plaintiff. The contract as found by the Courts below would be difficult of performance since its completion would depend upon the volition and concurrence of a third person who could not be compelled to give his assent thereto however willing the parties to the contract may be to perform their respective parts thereof.

The observations of the District Judge as regards the argument that if the plaintiff failed to obtain the consent of the malguzar he may lose the land and money as well, "that this may be so but he must first try" is to direct the plaintiff to do an act which he considers an impossibility, especially as the malguzar is under no legal obligation to give his assent to the proposed transfer, and, that too, at the request of the plaintiff. I, therefore, think that the fulfilment of the contract being, from its very nature, contingent upon the securing of consent of the landlord, whether by one party or the other, the plaintiff was entitled to ask the Court to direct the defendant to refund the consideration as the result of its finding that the consent of the landlord was under the terms of the contract to be procured by the plaintiff. The decree for specific performance cannot, therefore, stand and must be set aside.

It is necessary, in this view of the case, to settle the enquiries between the parties with due regard to the stipulation for payment of the interest as contained in the bonds, and the plaintiff's obligation to make good to the defendant the loss he has sustained by reason of his being deprived of the occupation of his premises ever since the date of the contract while restoring back possession of the same to him, after removal of whatever superstructure he (plaintiff) may have put up. The case must, therefore, go down for settling the equities between the parties.

The appeal is allowed and the case is remanded to the lower appellate Court for disposal with advertence to the above remarks. The costs of this appeal will be paid by the respondent. The appellant will get refund of Court-fee on the memorandum of second appeal. Costs in the lower Court will abide the result.

D.D.

Appeal allowed.

A. I. R. 1927 Nagpur 234

FINDLAY, J. C.

Sego Patel—Accused—Applicant.

v.

Parashram and another—Non-Appliants.

Criminal Revision No. 353 of 1925, Decided on 23rd March 1926, from an order of the 1st Cl. Mag., Balaghat, D/- 15th August 1925, in Misc. Criminal Case No. 15 of 1925.

Criminal P. C., S. 145—Ex-parte order—No evidence that absent party had knowledge—Order is bad.

Where-in a proceeding under S. 145 there is a total lack of evidence or even of circumstances from which a presumption can reasonably be drawn that a party had knowledge of the proceedings the Magistrate's procedure in going on with the case ex-parte amounts to much more than a technical irregularity and it is impossible to hold that the party was, or may not have been prejudiced thereby: *A. I. R. 1924 Nag. 171; 33 Cal. 68, F. B. Dist.* [P 234, C 2]

Order.—In Miscellaneous Criminal Case No. 15 of 1925, the First Class Magistrate, Balaghat, passed an order under S. 145, Criminal Procedure Code, declaring the non-applicant, Zitoo, to be in possession of certain absolute and occupancy fields in Mouza Sonzara regarding which there was a likelihood of a breach of the peace occurring. The order was passed ex-parte under circumstances to be referred to hereafter. The present applicant then moved the Sessions Court, Bhandara, for interference by way of revision but this was unsuccessful and the applicant has now moved this Court towards the same end.

After hearing parties I am satisfied that this is a case in which the procedure of the Magistrate cannot stand. Originally notice issued to applicant for a hearing fixed for 11th July 1925. The connected notice was shown or served on his brother on the previous day, a quite insufficient time to allow of his appearance, applicant's village being some 20 miles from Balaghat. In any event the endorsement shows that applicant was then absent from his village and was said to be at Waraseoni. However this may be, the Magistrate on 11th July 1925, ordered fresh notice to issue for 28th July 1925, the original notice not then having been received back. The endorsement on the second notice shows that applicant was again absent

from his village and was said to have gone to Balaghat. On 28th July 1925 however, the Magistrate presumed that there had been sufficient service and proceeded ex-parte. The Additional Sessions Judge, in passing the order he did has relied on the decision of Hallifax, A. J. C., in Criminal Revision No. 225 of 1923 decided on 20th October 1923 *Bhure Khan v. Fakira* (1) and on *Sukh Lal v. Tara Chand* (2), but in both these cases it was clear that the party professing to be aggrieved, had full knowledge of the proceedings. In the present case this is precisely the factum which is not established. There can be little more than a suspicion, certainly no certainty, that applicant knew of the proceedings. Moreover, there has been no proof that due diligence was used to effect service on applicant. Not only so but there is nothing to show that the Magistrate ordered or took steps to have affixed to a conspicuous place at or near the subject of dispute a copy of the preliminary order.

In the present case there is a total lack of evidence or even of circumstances from which a presumption can reasonably be drawn that applicant had by 28th July 1925 knowledge of the proceedings and the Magistrate's procedure in going on with the case ex-parte, therefore, amounted to much more than a technical irregularity and it is impossible to hold that the applicant was, or may, not have been prejudiced thereby. The proceedings of the Magistrate are accordingly set aside and he will take them from the point they had reached when he passed the preliminary order dated 29th July 1925 and will proceed to determine the connected matter according to law. I order accordingly.

D.D.

Order accordingly.(1) *A. I. R. 1924 Nag. 171.*

(2) [1903] 33 Cal. 68=9 C. W. N. 1046=2 C. L. J. 241 (F. B.).

A. I. R. 1927 Nagpur 235

FINDLAY, J. C.

Mt. Dhaniya Bai—Defendant No. 1—Appellant.

v.

Mt. Kausalyabai and another—Plaintiff and Defendant No. 2—Respondents.

Second Appeal No. 415 of 1925, Decided on 14th February 1927, from the decree of the Dist. J., Nagpur, D/- 19th August 1925, in Civil Appeal No. 92 of 1925.

Hindu Law — Succession — Deafness and dumbness must be congenital.

The deafness and dumbness must be congenital in order to exclude a person from inheritance: 45 Cal. 17 (P. C.) and A. I. R. 1923 Nag. 151, *Foll.* [P. 235, C. 1 & 2]

W. R. Puranik—for Appellant.

K. P. Vaidya—for Respondent No. 1.

Judgment.—The facts of this case have been fully stated in the judgments of the two lower Courts. On the appeal coming on for hearing the pleader for the appellant stated that he did not desire to dispute the findings of fact arrived at by the lower appellate Court. Even on these findings, however, three points were urged. The first of these was that the deafness and dumbness of *Mt. Kausalya Bai*, Plaintiff-Respondent No. 1, need not be congenital in order to exclude from inheritance. I have been referred to two decisions in this connection, viz., *Bai Pratapgavri v. Mulshankar* (1) in which case *Kajiji, J.*, held that dumbness as the ground of exclusion from inheritance under Hindu law must be incurable although it need not be congenital. Again, in *Charu Chunder Pal v. Nobo Sunderi Dasi* (2) *Norris and Banerjee, JJ.*, came to the conclusion that under the Bengal School of the Hindu law a widowed daughter having a son who is dumb at the time the succession opens out, but is not shown to be incurably dumb, is entitled to succeed to her mother's stridhan in preference to a daughter's son. This ruling does not, in effect, decide the point at issue, although *Banerjee, J.*, in the course of his judgment, expressed his opinion that dumbness, in order to disqualify a person from inheritance, need not be congenital. The matter, however, seems to me to be one in which I must necessarily follow the decision of their Lordships of the Privy

Council in *Gunjeshwar Kunwar v. Durga Prashad Singh* (3). In the said judgment the following quotation occurs from *Rajkumar Sarvadhikari's Hindu Law of Inheritance*:

Blindness, to cause exclusion from inheritance, must be congenital. Mere loss of sight which has supervened after birth is not a ground of disqualification. Incurable blindness, if not congenital, is not such an affliction as, under the Hindu Law, excludes a person from inheritance.

Having given this quotation their Lordships go on to hold that the said quotation is the true rule in this connection. A similar view was also taken by *Batten, J. C.*, in *Nana v. Jogilal* (4). The contention, therefore, that the non-congenital deafness and dumbness of *Mt. Kausalya Bai* would still exclude her from inheritance, necessarily fails.

The second point urged on behalf of the appellant was that, in view of the finding arrived at by the first Court, that the property in suit was acquired by *Hiralal* and *Jagannath* jointly with their funds, the plaintiff was, at the most, entitled to joint possession to the extent of half the houses in dispute. The husband of the present appellant, however, pre-deceased *Hiralal*, the husband of the plaintiff and it follows that the property passed to *Hiralal* by survivorship. It was presumably because this was so, that in paragraph 4 of the statement of the second defendant filed on 16—10—1922 a partition between *Hiralal* and *Jagannath* was pleaded, but the said partition has been held not to have been proved by both the lower Courts. In the circumstances, therefore, the present claim to joint possession is clearly entirely without substance.

Thirdly and lastly, it has been urged that, in any event, the present appellant was entitled to maintenance. Admittedly, no plea to this effect was offered in the lower Courts, and I do not think it can possibly be entertained now at this stage. It was not even raised in the appeal in the Court of the District Judge.

These findings govern the present appeal, which is dismissed. The appellant must bear the respondent's costs. Costs in the lower Courts as already ordered.

D.D.

Appeal dismissed.

(1) A. I. R. 1924 Bom. 353.

(2) [1891] 18 Cal. 327.

(3) [1918] 45 Cal. 17=42 I. C. 849=44 I. A., 229 (P. C.).

(4) A. I. R. 1923 Nag. 151=19 N. L. R. 69.

A. I. R. 1927 Nagpur 236

KINKHEDE, A. J. C.

Dattatraya and others—Plaintiffs—Appellants.

v.

Gopisa—Defendant—Respondent.

Second Appeal No. 58-B of 1926, decided on 12th February 1927, from the decision of the 1st Addl. Dist. J., Akola, D/-19th January 1926, in Civil Appeal No. 111 of 1925.

(a) Tort—Nuisance—Privy causing nuisance should be ordered to be built after latest models to prevent its being source of trouble to neighbours.

It is within the jurisdiction of a Court, in the case of an actual nuisance, to insist upon the owner of the latrine or other source of nuisance taking due care for preventing offensive smells from emanating from them and causing private nuisance to his neighbour. The defendant in such cases could be ordered to build his latrine after the latest scientific pattern with trap-doors etc. which would minimise the chances of its being a source of trouble and inconvenience to his neighbour. He could also be restrained in regard to its capacity being over-taxed and thus becoming an inevitable source of private nuisance. He could as well be ordered to take such precautions as regards its user as would prevent its causing injury to the health of the inmates of his neighbours' houses. [P 237 C 1]

(b) Tort—Nuisance, private or public—Expert evidence is of great use.

For a Court to decide rightly whether a particular nuisance is one in that the inconvenience is only to the public or there is a special injury to a particular individual, sanitary or medical expert evidence is of very great value and is an absolute necessity. [P 237 C 1]

*A. V. Khare and W. B. Pendharkar—*for Appellants.

Judgment.—This second appeal by the plaintiffs arises out of a suit filed by them for a permanent injunction against the defendant on the ground that the latter opened a door abutting on plaintiffs' ota and constructed a cess-pool and latrine on Municipal land near their house. The parties are neighbours. The plaintiffs' case is that the defendant has committed an actionable wrong in constructing the cess-pool and latrine which causes nuisance to them. They therefore want that the defendant be ordered not to have any building, door or latrine or cess-pool on the land A B C in dispute.

The defence was that the ota belonged to the defendant and that the latrine and cess-pool do not cause any nuisance to plaintiffs. The trial Court held that

the ota belonged to plaintiffs and that the latrine and cess-pool do cause nuisance to plaintiffs. It accordingly passed a decree for a permanent injunction. The defendant therefore appealed to the Additional District Judge's Court. The learned Additional District Judge differed from the Court and held that plaintiffs failed to prove that the ota belonged to them. As regards the site on which the latrine and the cess-pool stand it came to the conclusion that

the question of title has no bearing in the case for the title does not admittedly rest in the plaintiff and plaintiff has therefore no right to claim any relief on that score * * * the site may belong to any one, but it is apparent that defendant has no right to commit nuisance on the land even if it were owned by himself.

The question then was whether the action of the defendant could be called a nuisance and whether the same constituted an actionable wrong. That the latrine and the cess-pool are a source of nuisance to the plaintiffs is found by the Courts below as a fact and this is not disputed before me. The lower appellate Court wanted to relieve the plaintiffs of that nuisance by trying to find out whether it could be located elsewhere so as to cause no nuisance to plaintiffs. But the findings of the first Court which it had called up establish beyond doubt that the latrine and cess-pool if shifted to another side of the premises in dispute would be a source of nuisance to another neighbour. This confirms the finding that the latrine and the cess-pool is going to be a permanent source of trouble and nuisance to the defendant's neighbours whoever they may be. Why of all others the plaintiffs must suffer the inconvenience I cannot understand. The ratio decidendi of the cases reported *Jafar Sahib v. Kadir Rahiman* (1) and *Rama Rao v. Martha Sequeira* (2) is that if the privy be found to be a private nuisance the owner must be ordered to remove it altogether or shift it to such distance from the injured party's dwelling as will not cause any discomfort or danger to the health of the inmates of his house. The case in *Amarendra Nath Dey v. Baranagore Jute Factory Co., Ltd.* (3) contemplates the imposition of certain conditions or restrictions, or even the

(1) [1888]=12 Bom. 634.

(2) [1919] 42 Mad. 796=37 M. L. J. 224=10 L. W. 147=52 I. C. 921=(1919) M. W. N. 618.

(3) A. I. R. 1923 Cal. 271=49 Cal. 1059.

adoption of precautionary measures for the prevention of injuries in the future and reservation of a liberty to the party apprehending the injury of bringing a fresh suit in the event of the threatened injury sought to be prevented by a *quia timet* action becoming an actual nuisance.

It therefore, appears that it is within the jurisdiction of a Court, in the case of an actual nuisance, to insist upon the owner of the latrine or other source of nuisance taking due care for preventing offensive smells from emanating from them and causing private nuisance to his neighbour. The defendant in such cases could be ordered to build his latrine after the latest scientific patterns with trap doors, &c., which would minimize the chances of its being a source of trouble and inconvenience to his neighbour. He could also be restrained in regard to its capacity being overtaxed and thus becoming an inevitable source of private nuisance. He could as well be ordered to take such precautions as regards its user as would prevent its causing injury to the health of the inmates of his neighbours' houses. This aspect of the question has not been duly considered by the Courts below in the present case. A careful scrutiny of the reports of the aforesaid Madras, Calcutta cases and also the case of this Court, namely *Rama Rao v. Martha Sequeira* (2), *Amerendra Nath v. Barnagore Jute Factory Co. Ltd.* (3) and *Municipal Committee of Saugor v. Nilkanth* (4) clearly shows that the findings as to the nuisance or otherwise were based on medical or sanitary expert's evidence. This kind of evidence has not been adduced in this case. Its value cannot be underestimated in a case of this kind. For a Court to decide rightly whether a particular nuisance is one in that the inconvenience is only to the public or there is a special injury to a particular individual, such expert evidence is of very great value and is an absolute necessity. Without it the Court may not be in a position to know what scientific or other effectual precautions must the owner of the privy be ordered to take or it would be justified in imposing on him in order to ensure the safety of the health of the inmates of the injured party's house.

The material on record is not sufficient to enable me to decide the case

from this point of view. I therefore remand the case for a fresh decision as to how far the nuisance which the Courts below have found is a private nuisance causing special injury to the plaintiff and what ways and means can be devised with the help of medical or sanitary expert's evidence for the prevention of the privy and the cess-pool erected by the defendant becoming a source of private nuisance to plaintiffs and for deciding what suitable precautions short of removal of latrine and cess-pool, can the defendant be ordered, by means of a permanent injunction, to adopt in order that they should cause no discomfort to, or danger to the health of the inmates of plaintiffs' house, and that if that be not possible, whether the present is not a fit case for ordering the latrine and cess-pool to be removed altogether from the vicinity of the plaintiffs' premises, it being borne in mind that the house acquired by the defendant had no privy attached to it in the past and the defendant is opening a new source of nuisance on land either Municipal or his own.

The appeal is allowed and the case is remanded to the lower appellate Court which will be at liberty to send it down to the Court of first instance for recording evidence or for fresh decision with advertence to the above remarks.

The plaintiff will get a refund of the Court-fee paid on the memorandum of appeal to this Court. Other costs shall abide the event.

D.D.

Case remanded.

A. I. R. 1927 Nagpur 237

FINDLAY, J. C.

Gambhirya—Defendant—Applicant.

v.

Sakharam—Plaintiff—Non-applicant.

Civil Revision No. 2 of 1927, Decided on 10th March 1927, from the decree of the Addl. Dist. J., Nagpur, in Civil Appeal No. 84 of 1926, D/- 12th October 1926.

Transfer of Property Act, S. 50—Tenant knowing about dispute as to claim to landlord's title but choosing one claimant—He is not protected—In case of doubt he can proceed as under C.P. Tenancy Act (1920), S. 68.

Where a tenant knew of the dispute between two rival claimants to the title of landlord but chose one of them and paid rent to him.

(4) [1915] 11 N. L. R. 132=31 I. C. 62.

Held: that the payment cannot be said to be bona fide and S. 50 did not cover the case.

Held further, that if he had entertained any genuine doubt as to whom the payment should be made, an easy way of escape was provided for him by S. 68 of the C. P. Tenancy Act.

[P 238 C 2]

S. R. Vaidya—for Applicant.

Order.—The defendant applicant, Gambhirya, was sued in the Court of the Additional Subordinate Judge No. 2, Nagpur, for rent arrears amounting to Rs. 22-12-0 in respect of his absolute occupancy holding in mouza Degma for the years 1334 and 1335 Fasli. The position of the present defendant in the first Court was a curious one. Apparently the question of the lambardarship of the village was in dispute and his position was that he had recognised one V. N. Datar who had been the agent of the previous lambardar, as the landlord. Admittedly, however, the present plaintiff non-applicant was appointed lambardar on 15-1-1926, but the applicant's position is that he was absolved by the payments made to the said Datar. The Judge of the first Court granted the plaintiff a decree holding that the payment to Datar could not discharge the defendant.

An appeal was filed in the Court of the Additional District Judge, who held that section 50 of the Transfer of Property Act could afford no help to the defendant. The latter had held the land from the previous Mahajan until 16-9-1924, and so long as he was alive there was no question as to who the landlord was.

As I read the defence of the applicant in the first Court, his position was:

I knew there was a dispute as to who was to succeed to the title of Mahajan. I chose to recognise Datar as the landlord and I am, therefore, absolved.

It has been urged on behalf of the applicant in this Court that the case comes within the purview of section S. 50 of the Transfer of Property Act, or that at any rate, the principle laid down therein should be applied. I am wholly unable to accept this proposition. In the first place, the attitude of the defendant as well as his whole position in the first Court was that it lay with him to choose whom he would recognise as the person entitled to receive his rent and that having chosen Datar he was absolved. I find it impossible to believe that at the time he was ignorant as to the pending dispute as

to title; so it is impossible, in my opinion, to hold that his action was in good faith, while it is equally obvious that S. 50 of the Transfer of Property Act cannot cover the case because he never in good faith could have held the property as from Datar. Moreover, there was the least excuse for the applicant in that, if he had entertained any genuine doubt as to whom the payment should be made to, an easy way of escape was provided for him by S. 68 of the C. P. Tenancy Act.

The applicant has, in short, in my opinion, been very ill-advised in contesting the present suit. His obvious course was to have paid the arrears due from him to the present plaintiff non-applicant and to have sued Datar for refund of the rental payments made to him. I think the lower appellate Court, therefore, has come to an undoubtedly sound conclusion and I am unable to interfere. The application for revision is accordingly dismissed without notice to the non-applicant. This order also covers Second Appeal 4 of 1927, Second Appeal 5 of 1927, Second Appeal No. 35 of 1925, Civil Revision 1 of 1927 and Civil Revision 3 of 1927.

D.D.

Application dismissed.

A. I. R. 1927 Nagpur 238

FINDLAY, J. C.

Govinda—Defendant—Appellant.

v.

Jairam Das—Plaintiff — Non-applicant.

Civil Revision No. 397 of 1926, Decided on 9th March 1927, from the order of the Small Cause Court J., Nagpur, D/- 25th September 1926, in Misc. Judicial Case No. 61 of 1926:

Limitation Act, S. 5—Provincial Small Cause Courts Act, S. 17 (i).

A Court has discretion under S. 5 of the Limitation Act to excuse delay in making the application as required by S. 17 of the Provincial Small Cause Courts Act: 24 C. W. N. 380, not Appr.; A. I. R. 1922 Mad. 186, Appr.; A. I. R. 1922 Mad. 354 and 37 All. 591, Ref. [P 239 C 2]

R. N. Padhay—for Applicant.

T. Hiralal—for Non-Applicant.

Order.—On 27-4-1926, decree was passed by the Judge of the Small Cause Court, Nagpur, ex-parte against the present defendant-applicant, Govinda. On

16—6—1926, Govinda presented an application to set aside the ex-parte decree on the ground that he had been ill on the date of hearing. Under the proviso to S. 17 (1) of the Provincial Small Cause Courts Act it was incumbent on the applicant, at the time of presenting his application, either to deposit the amount due by him under the decree or to give security for the performance thereof. He did not furnish such security along with the application, and it is noticeable that in the main application nothing was said about security. Objection was taken on 16—9—1926 by the plaintiff in this respect and, thereupon, the present applicant filed another written statement to the effect that he had been ready to furnish security but the Execution Clerk, on the 16th of June, had been busy and directed him to furnish security on the date of hearing, viz., the 16th of September 1926.

It is noticeable in this connexion that the so-called affidavit of 16—9—1926 has not been sworn to before the requisite Officer and there is, in reality, no proof whatever that any such episode with the Execution Clerk of the Court occurred on the 16th of June, as the applicant alleged for the first time some three months later. However this may be, the lower Court held that the provisions of S. 17 of the Small Cause Courts Act were mandatory, and as regards the possibility of applying S. 5 of the Limitation Act to the case, the Judge of the Small Cause Court was of opinion that it was doubtful whether the said section of the Limitation Act could be made use of in the circumstances of the case. In coming to this conclusion, the Judge of the Small Cause Court relied on an obiter of Sanderson, C. J., in *Abdul Sheikh v. Mahammad Ayub* (1). In the said case the learned Chief Justice expressed doubt whether S. 5 of the Limitation Act applied at all to such a case as at present in view of the fact that the main application was made within time. The learned Chief Justice, however, did not discuss this point in detail, and, with all deference, I prefer the view of Oldfield and Rao, JJ., taken in *Sudalaimuthu Kudumban v. Andi Reddiar* (2) for the reasons stated in the said judgment. A

similar view has also been taken by Ramesam, J., in *Koilpillai Samban v. Sappanimuthu Samban* (3): [cf. also *Munna Lal v. Radha Kishan* (4).] In view of the law I take, therefore, it was incumbent on the lower Court to exercise in one direction or another the discretion which it had under S. 5 of the Limitation Act. It is clear from the terms of the lower Court's order that its opinion was that S. 5 could not possibly apply at all, but that was not so. The lower Court has, therefore, failed to exercise a jurisdiction which was vested in it and the case must go back to that Court for decision on the merits of whether or not it should exercise a discretion in favour of the applicant under S. 5 of the Limitation Act on the allegations put forward by him.

The order, of which revision is sought, viz., that dated 25th of September 1926, is accordingly set aside and the case is remanded to that Court for disposal of the application, dated 16—6—1926, on the merits with advertence to the remarks contained in this order. Costs incurred by the parties in this Court will follow the event.

D.D.

Order set aside.

(3) A.I.R. 1923 Mad. 354.

(4) [1915] 37 All. 591=30 I.C. 186=13 A.L.J. 793.

A. I. R. 1927 Nagpur 239

FINDLAY, J. C.

Ramnarayan and others—Applicants.

v.

Lachman Prashad and others — Non-Applicants.

Civil Revision No. 73 of 1927, Decided on 30th March 1927.

Court fees — Partition suit by Hindu son — Mortgage decree in respect of some property passed against father, son not being party — Son must pray for declaring mortgage-decree not binding on him and pay ad valorem Court fees.

Where in a suit for partition by a Hindu son he includes a certain property in respect of which a decree has been passed against his father, and he was not a party to that suit, the son in his suit for partition must pray for declaring that the decree is not binding on him and pay ad valorem Court fees on the amount of decree for such relief: 9 N. L. R. 1; 16 N. L. R. 64; Ref. [P 240 C 1]

*M. R. Bobde—for Applicants.**K. P. Vaidya—for Non-Applicants.*

Order.—The applicants have come up in revision against the interlocutory order of the Additional District Judge,

(1) [1920] 24 C.W.N. 330=56 I.C. 551=31 C. L.J. 197.

(2) A.I.R. 1922 Mad. 186=45 Mad. 628.

Nagpur, Dated 15—1—1927, ordering them to amend their plaint in Suit No. 9 of 1926 by including a relief to the effect that the decree passed in favour of the defendants non-applicants Lal Behari and Ramcharan, is not binding on them and to pay ad valorem Court-fee in respect of this relief.

Admittedly, preliminary and final decrees had been obtained before the filing of Suit No. 9 of 1926 against the Defendants Nos. 1 and 2 under a mortgage in favour of the non-applicants Nos. 4 and 5. Defendant No. 1 is also admittedly the manager of the joint family, of which the plaintiffs are members. It is, no doubt, true as pointed out by Mittra, A. J. C., in *Motiram v. Asaram* (1) that although in a suit on a mortgage brought against the father in his representative capacity the father represents the joint family, the sons may, in certain circumstances, re-open a decree against him on grounds personal to themselves, e. g., that the debt for which the mortgage was given was not binding on them under the Hindu Law. At the same time, apart from this incidental matter, the decision of Batten, A. J. C., on the main question involved in *Gore v. Kashiram* (2) still remains good law in these Provinces and I am wholly unable to appreciate the position of the applicants:

It seems to me that, in the circumstances of this case, the applicants were bound to ask for a declaration that the mortgage-decree in question is not binding on them and, if they asked for this relief, the Additional District Judge has rightly called on them to pay the enhanced Court-fees. The position of the applicants is said to be as follows:—

"We merely want partition; we do not wish the mortgage-decree to be set aside."

Very obviously, however, they cannot, in effect, obtain the partition they desire unless they also claim a declaration that the mortgage-decree in favour of the non-applicants Nos. 4 and 5 is not binding on them. The fact that they were not parties in the mortgage suit is quite immaterial in view of the law laid down by Batten, A. J. C., in the case quoted, *Gore v. Kashiram* (2), a decision with which I respectfully declare my concurrence.

(1) [1919] 16 N.L.R. 64=53 I.C. 776.

(2) [1913] 9 N.L.R. 1=18 I.C. 848.

I am of opinion, therefore, that the order of the Additional District Judge is a correct one and I dismiss the application without notice to the non-applicants.

R.D.

Application dismissed.

A. I. R. 1927 Nagpur 240

KINKHEDE, A. J. C.

Jairam Kunbi—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revision No. 209-B of 1926, Decided on 8th February 1927, from the order of the 2nd Class Magistrate, Balapur, D/- 11th December 1926, in Criminal Case No. 18 of 1926.

Criminal P. C., S. 257—Recalling prosecution witnesses for cross-examination—Accused must bear expenses.

Where the case was closed without granting adjournment to accused to cross-examine prosecution witnesses through his pleader, the order was set aside subject to accused paying the expenses: 37 Cal. 236 and 43 Mad. 411, Ref. [P 240 C 2]

W. B. Pendharkar—for Applicant.

Order.—The application must succeed. The Magistrate admits in his explanation that the accused was undefended by a pleader; he was therefore naturally unable to cross-examine the witnesses. The cross-examination by himself shows what its worth is. The accused was thus placed in a very disadvantageous position by reason of his pleader's absence and the refusal of the Magistrate to adjourn the hearing at the request of the newly engaged pleader. The Magistrate could well have exercised his discretion in giving the adjournment prayed for. I think the order closing the case for judgment must therefore be set aside, and it is accordingly set aside, but subject to terms. The accused will have now full opportunity to cross-examine all the prosecution witnesses through a pleader subject however to the condition that he will have to bear the expenses of recalling those witnesses; compare *Indar Rai v. Emperor* (1) and *Lockby v. Emperor* (2).

D.D.

Order set aside.

(1) [1910] 37 Cal. 236=14 G. W. N. 280=5 I. C. 403=11 Cr. L. J. 128.

(2) [1920] 43 Mad. 411=38 M. L. J. 209=11 L. W. 130=55 I. C. 345=(1920) M. W. N. 137.

* A. I. R. 1927 Nagpur 241

KINKHEDE, A. J. C.

Udaram Magniram—Applicant.

v.

Laxman Marwari—Non-Applcant.

Civil Revision No. 12-B of 1926, Decided on 7th August 1926, from the decision of the Small Cause Court, J., Basim, D/- 4th December 1925, in Civil Suit No. 76 of 1925.

* (a) *Decree—Validity—High Court ordering stay of suit—Stay order not communicated to trial Court—Decree is valid.*

Where the High Court passed an order staying the suit in the lower Court, but before the order could be communicated to it, it passed a decree in that suit.

Held: that the decree must be treated as validly passed: 41 *Mad.* 151, *Foll.*; 33 *Cal.* 927, *not Foll.* [P 242, C 1]

* (b) *Evidence Act, S. 91—Pronote ineffective for want of proper stamp—Creditor can fall back on original transaction—Contract Act, S. 70.*

A creditor can fall back on the original transaction and recover his money on its basis when it is found or conceded that the document or instrument which he had obtained from the debtor was ineffective to establish any contractual relation of debtor and creditor between them so as to serve as a basis for a suit in a Court of law. 6 *N. L. R.* 125, *Foll.* [P 242, C 1]

Although Ss. 91 and 92 prohibit any secondary evidence of the terms of a written contract, they do not exclude proof of a statement of a fact recited therein. Where, therefore, an insufficiently stamped pronote is not admissible to prove the specific term of the contract embodied therein, namely, the unconditional undertaking or promise to pay the sum with its interest, it could be used as a mere acknowledgment or statement containing defendant's admission of receipt of money and of his own liability therefor to the person from whom he took it. The pronote failing to take effect as such, the creditor could also treat the contract as non-existent and ask for refund of consideration on the ground that it failed. [P 242, C 2]

W. B. Pendharkar—for Applicant.

M. R. Bobde—for Non-Applcant.

Order.—This and the connected Civil Revision No. 181-B of 1925 have been filed under the following circumstances.

The plaintiff filed a suit in the Small Cause Court on foot of a pronote dated 26-1-25 for Rs. 400, executed by the present appellant. That pronote was required according to the Amendment of the Stamp Act to be stamped with a 2 annas stamp, but through inadvertence or ignorance was stamped with one anna only. This defect in the stamp was noticed by the plaintiff at the time of

filing the suit and he, therefore, inserted a clause in the plaint that it is likely to be held that the pronote is inadmissible in evidence and cannot serve as a basis for the suit and that he, therefore, claims to recover the money not on its basis as a contract containing an unconditional promise to pay, but in the alternative on the basis of the negotiations that preceded it, together with interest at Re. 1 p. c. p. m. The defendant naturally took the plea of the pronote not being admissible in evidence and raised the contention that plaintiff cannot also sue for money in the alternative. The trial Court as per its order dated 16-9-25 overruled this contention relying on *Gokuldas v. Parmanand* (1) and proceeded to try the suit on its merits and fixed 3-11-25 as the date for hearing evidence. In the meantime, the applicant filed Civil Revision No. 181-B of 1925 in this Court on 30-9-25 and obtained an order dated 3-10-25 for stay of proceedings which through oversight were described as execution proceedings. The lower Court thinking that in the absence of a decree capable of execution, there could be no stay of execution and proceeded to fix the case again for evidence for 4-12-25. The applicant though cognizant of the order dated 3-11-25 calling upon to adduce evidence summoned no witnesses for 4-12-25 nor did he take any steps early enough to obtain a proper order from this Court to stay further proceedings. He moved this Court just a couple of days before the date of hearing of the case in the lower Court for the appropriate order for stay and got it on 3-12-25. But before this order could be communicated to the lower Court, that Court decided the case and passed a decree against the defendant-applicant on 4-12-25. Against this decree also he filed another Civil Revision No. 12-B of 1926 on 16-2-26 and both these revisions will be disposed of by this order.

Firstly it is contended that the decree dated 4-12-25 should be discharged as having been passed in spite of the order for stay dated 3-12-25. Reliance is placed on the rulings of the Calcutta High Court in *Hukumchand Boid v. Kamalanand Singh* (2) in support of this contention by the applicant, whereas

(1) [1910] 6 *N. L. R.* 125=8 *I. C.* 281.

(2) [1906] 33 *Cal.* 927=3 *C. L. J.* 67.

the non-applicant contends on the strength of the ruling and the principle enunciated in *Venkatachalapatrao v. Kameswaramma* (3) that the decree must be treated as validly passed. I think the non-applicant's contention must prevail in this respect. The Court below retained jurisdiction in the absence of any communication of the order staying its hands.

The next contention is that the lower Court's order dated 11-9-25 is erroneous and against law and must be set aside in view of the decision of Madras High Court in *Pothi Reddi v. Yelayudasivan* (4) followed in *Mutha Shastrigal v. Vishwanath* (5), *Somasundaram v. Krishnamurti* (6) and *Chandasing v. Amritsar Banking Co.* (7). On the other hand the non-applicant maintains that the order is correct as it has the authority not only of this Court's ruling in *Gokuldas v. Paramanand* (1), but also of the High Court of Allahabad in *Ramswarup v. Jasodha Kunwar* (8). On going through the conflicting decisions bearing on the point I am of opinion that the view taken by this Court in *Gokuldas v. Paramanand* (1) is in more consonance with justice and equity than that taken in the Madras High Court which has wavered from time to time. I, therefore, hold that the plaintiff was rightly allowed by the Court below to fall back on the original transaction and to recover his money on its basis when it was found or conceded that the document or instrument which the applicant gave to the non-applicant was ineffective to establish any contractual relation of debtor and creditor between them so as to serve as a basis for a suit in a Court of law. The document styled as a pro-note remained incomplete so to say for want of insufficient stamp duty by the default of the applicant, it being his legal duty under S. 29 of the Stamp Act to pay the necessary stamp duty thereon. He cannot be allowed to profit by his own breach of a legal duty or derive any

undue advantage by being permitted to swallow the money he got on the faith of such an invalid instrument.

Then again, although Ss. 91 and 92 of the Evidence Act prohibit any secondary evidence of the terms of a written contract they do not exclude proof of statement of a fact recited therein: *Lalsing v. Chaitran* (9). It therefore, follows that although the instrument is not admissible to prove the specific term of the contract embodied therein, namely the unconditional undertaking or promise to pay the sum with its interest, it could be used as a mere acknowledgment or statement containing defendant's admission of receipt of money and of his own liability therefor to the person from whom he took it. For such a purpose a stamp of one anna was sufficient. The instrument might be read as if it did not contain any such promise or undertaking to pay.

Section 70 of the Contract Act also makes it clear that the defendant must compensate the person whose non-gratuitous act has benefited him. The instrument of pro-note failing to take effect as such, the creditor could certainly treat the contract as non-existent and ask for refund of consideration on the ground that it failed. In this view of the case also the decision sought to be revised seems to be in accordance with law and cannot be set aside. The applications are, therefore, rejected with costs. I fix pleaders' fee in each case at Rs. 15.

D.D. *Application rejected.*

(9) [1902] 15 O. P. L. R. 21.

A. I. R. 1927 Nagpur 242

FINDLAY, J. C.

Sheokisan—Plaintiff—Appellant.

v.

Narayan Wasudeo Joshi—Defendant—Respondent.

Misc. Appeal No. 44 of 1925, Decided on 26th February 1927, from the judgment of the Addl. Dist. J., Bhandara, D/- 25th September 1925, in Misc. Appeal No. 4 of 1925.

Execution—Decree binding—Decree not on compromise—Saleability of land ordered to be sold by the decree cannot be questioned by executing Court.

When a decree is based on a compromise and when it contains a condition which cannot be

(3) [1918] 41 Mad. 151=5 M. L. W. 617=33 M. L. J. 515=13 I. C. 214=(1917) M. W. N. 785.

(4) [1887] 10 Mad. 94.

(5) [1914] 33 Mad. 650=23 M. L. J. 19=21 I. C. 864=(1914) M. W. N. 53.

(6) [1907] 17 M. L. J. 126.

(7) A. I. R. 1922 Lah. 307=2 Lah. 330.

(8) [1927] 31 All. 158=13 I. C. 133=9 A. L. J. 72.

legally enforced, the decree, so far as that condition is concerned, is inoperative and, so to speak, the illegal part of it cannot be executed: *A. I. R. 1924 Nag. 84, Foll.* [P 243 C 2]

But there is no good ground for extending this principle to all other decrees passed by a Court and therefore when a decree is not a compromise decree, the executing Court cannot go into the question of saleability of the land ordered under the decree to be sold: *22 W. R. 460; 9 C. P. L. R. 136 and 15 C. P. L. R. 134, Ref.* [P 243 C 2]

Y. V. Jakardar—for Appellant.

M. R. Pathak—for Respondent.

Judgment.—The present plaintiff-appellant, Shoekisan, filed a suit for arrears of revenue against the defendant-respondent Narayan Wasudeo Joshi in the Court of the Second Munsiff, Bhandara. The suit proceeded *ex parte* and preliminary decree for sale was passed on 26-10-1923, the plaintiff having claimed a charge on certain milkiyat Sarkar land therein. Notice issued to the defendant-respondent before the decree was made final. He again remained absent and final decree was granted on 12-1-1924. Later on execution proceedings started and proclamation of sale etc. issued. The sale was held on 23-10-1924 and the decree-holder having obtained permission to bid, bought the property. Thereafter, the appellant as purchaser deposited a fourth of the purchase money. On 29-11-24 the executing Court set aside the sale on the ground that the purchaser had not deposited the three-fourths balance of the purchase money. Meanwhile, the judgment-debtor had deposited the amount of the claim and this was ordered to be paid to the decree-holder.

An appeal followed against this order to the Court of the Additional District Judge, Bhandara. He held that the decree-holder was entitled to set-off the balance of the purchase money and he accordingly set aside the order of the first Court, dated 19-11-24, and remanded the application for execution to that Court for disposal according to law. On 8-5-25 accordingly the first Court passed order confirming the sale and struck off the case as fully satisfied. This order was once more appealed against by the present judgment-debtor respondent, and the Additional District Judge, by his order dated 25-9-1925, once more remanded the case for further proceedings to the first Court. The reason for this remand was that in his opinion there seemed reason to suppose that the lands

in the decree, which were specifically ordered to be sold, could not be so sold but he was unable to dispose of this matter entirely until the extent and nature of the judgment-debtor's interest in the milkiyat Sarkar land had not been made out, and he found it necessary to remand the case once more to the Court of first instance.

Assuming that ordinarily the land in question could not be legally brought to sale the question I have to decide is whether the lower appellate Court was correct in thinking that it could, in the circumstances, go behind the judgment and decree in Suit No. 149 of 1923. In arriving at the decision he did, the learned Additional District Judge placed reliance on the decisions of *Prideaux, A. J. C.*, in *Parasharam v. Sitaram* (1). The learned *A. J. C.* in that case, came to the conclusion that when a decree is based on a compromise and when it contains a condition, which cannot be legally enforced, the decree, so far as that condition is concerned, is inoperative and, so to speak, the illegal part of it cannot be executed. In arriving at the conclusion he did, *Prideaux, A. J. C.* made reference to the decisions in *Lakshmanaswami Naidu v. Rangamma* (2) and *Ramasami Naik v. Ramasami Chetti* (3). As these decisions show, a clear distinction has to be made in this connexion between a decree based on a compromise and a decree otherwise passed under ordinary circumstances by a Court. Such a compromise decree is, in effect, a mere reflection of the prior contract to compromise the suit which the parties concerned have arrived at. It naturally follows therefrom that, if the contract in question contains a condition which the Courts would ordinarily not enforce as being illegal or opposed to public policy, the executing Court will also decline to enforce any such condition, even although it has been embodied in the compromise decree.

I am unaware, however, of any good ground for extending the principle in question to all other decrees passed by a Court. It is very obvious that any such interference by an executing Court with the decree as passed by an original

(1) *A. I. R. 1924 Nag. 84=20 N. L. R. 1.*

(2) [1903] 26 Mad. 31.

(3) [1907] 30 Mad. 255=17 M. L. J. 201.

Court must be strictly limited and in *Shirekuli Timapa Hegda v. Mahablya* (4) Birdwood and Jardine, JJ., declined to interfere in a case in which it was alleged that a compromise decree contained a penal stipulation. The admission of a power to vary the requirements of a decree once it has been passed will inevitably introduce confusion and uncertainty, and if ordinary decrees not passed on a compromise, as the present one is, were to be challengable in execution proceedings on the ground that they contained an illegal condition, a state of little less than a judicial chaos would result.

There is abundant authority for the view that once a decree has become final the executing Court is incapable of once more reopening the question as to its being an illegal or a valid decree save in the exceptional case of a compromise decree, with which I have dealt above: cf. *Sunkur Singh v. Huree Mohan Thakoor* (5), *Balaji Vithoba v. Balkrishna Raji* (6) and *Parkhit v. Chamra* (7). I am of opinion, therefore, that the lower appellate Court was incorrect in remanding the case for enquiry into the question of the nature and extent of the judgment-debtor's interest in the milkiyat sarkar land and as to saleability of such land under the decree. Whether as against Government the plot is saleable is a matter I am not concerned with here, as against the judgment-debtor-respondent, the decree as such is clearly enforceable. The order of the remand is, therefore, set aside and the case will go back to the lower appellate Court for decision of the other questions which arose in the appeal. The questions which remain are included in the third ground of appeal as well as in the additional ground of appeal filed on 23-9-25, viz., as to whether the sale should not have been confirmed in view of the alleged failure of the decree-holder to exercise his right of set-off of the decretal amount against the purchase money by legal process of law in due time, and as regards the effect of the decree-holder's alleged withdrawal of the deposit on 4-12-24.

The remanding judgment of the lower appellate Court, dated 25-9-25, is accord-

ingly reversed and the case will go back to that Court for disposal of the remaining grounds of appeal in Miscellaneous Appeal No. 4 of 1925. Costs of the appeal in this Court will follow the event.

D.D.

Order set aside.

A. I. R. 1927 Nagpur 244

KINKHEDE, A. J. C.

Karnachandra and others—Accused—Applicants.

v.

Emperor—Non-Applicant.

Criminal Revision No. 54-B of 1927, Decided on 29th March 1927, from the order of the Dist. Mag., Akola, D/- 16th February 1927, in Criminal Case No. 32 of 1926.

Criminal P. C., S. 528—Notice under, should be given—Want of notice—Question as to is not of legality, but one of propriety.

Although S. 528 does not provide for the giving of a notice to the opposite party, still on general principle notice should be given to the party affected, before an order for transfer is made: 7 C. W. N. 114, *Ref.*; 14 C. P. L. R. 190 *Cr., Foll.* [P 244 C 2]

But a want of notice under S. 528 does not amount to illegality. The question of notice is one of propriety rather than of legality, and as such, it is one to be decided on the facts of each particular case: 21 Bom. L. R. 276, *Ref.* [P 245 C 1]

W. R. Puranik and D. W. Pinge—for Applicants.

G. P. Dick—for the Crown.

Order.—However reluctant I may be to interfere with the exercise of the discretion which the law gives to a District Magistrate in the matter of ordering transfers or withdrawal of criminal cases from the file of one Subordinate Court to another Court and vice versa, I am bound to say that the District Magistrates have to be very careful whenever they are called upon by one party only to exercise such power. Although S. 528 of the Criminal P. C. does not provide for the giving of a notice to the opposite party, still on general principle notice should be given to the party affected, before an order for transfer is made: cf. *Ajadhaya Lal v. Prayag Narain* (1). The District Magistrate states in his

(1) [1903] 7 C. W. N. 114.

(4) [1886] 10 Bom. 435.

(5) 22 W. R. 460.

(6) [1896] 9 C. P. L. R. 196.

(7) [1902] 5 C. P. L. R. 131.

explanation that no notice is required under S. 528, Criminal P. C. This is so, no doubt, under the statute. But so far back as in 1901 this Court has pointed out in *Rao Ramsingh v. Hussain Ali* (2), that before a District Magistrate can transfer a case from one Subordinate Court to another Subordinate Court, notice of such intended transfer should be served upon the parties so as to enable either of the parties to come forward and show cause why such transfer should not be made. The learned Judicial Commissioner placed reliance for this view on the cases of *Teacotta Shekdar v. Ameer Majee* (3), *Imperatrix v. Sadasheo* (4), and *Umraosingh v. Fakirchand* (5). In a case of a recent date decided by the Bombay High Court and reported as *In re Hawaji Sakharan Mhalaskar* (6), Heaton and Pratt, J.J., pointed out that though the trend of the decisions of that Court, ever since the case of *Imperatrix v. Sadasheo* (4), was to treat an order made under S. 528, Criminal P. C., without notice as illegal, the recent practice was to treat want of notice as not amounting to illegality and that the question of notice was one of propriety rather than of legality, and, as such, it was one to be decided on the facts of each particular case. In that case, as in the present case, the trial had occupied several hearings before the Magistrate, in the course of which the whole of the prosecution evidence was led, charges were framed against the accused, and cross-examination of some of the prosecution witnesses was furnished and the case had stood adjourned for recording the evidence of defence witnesses. Such a stage was regarded as a very late stage of the case and the order of transfer was at the instance of the complainant set aside as improper on the ground that it was passed on the application of one party (i. e. the accused) without giving the other party, the complainant, an opportunity of being heard, and the Magistrate ordering the transfer was directed to hear the matter after issue of notice to both the parties. The principle of this case very fittingly applies to this case also.

I therefore set aside the order of transfer and direct the District Magistrate to rehear the application for transfer and dispose it of in accordance with law.

D.D.

Order set aside.

A. I. R. 1927 Nagpur 245

HALLIFAX, A. J. C.

Pandu—Plaintiff—Appellant.

v.

Kautika Bai—Defendant—Respondent.

Second Appeal No. 56 of 1923, Decided on 20th September 1924, against the decree of the Dist. J., Wardha, D/- 19th December 1922, in Civil Appeal No. 112 of 1922.

C. P. Tenancy Act (1898), S. 46 (1)—“Occupy” meaning of.

A proprietor holding cultivating possession of sir land can be said to “occupy” that land for the purposes of S. 46 (1): *Case law discussed.*
[P 246 C 1]

B. K. Bose and *P. N. Rudra*—for Appellant.

V. R. Pandit, and *T. J. Kedar*—for Respondent.

Judgment.—The two persons who instituted this suit claimed to be the heirs of a deceased Hindu, Mahadeo Kunbi, and to be entitled to possession of his estate on the termination by remarriage of the limited ownership of his widow. As not infrequently happens, one of the two plaintiffs who claimed to inherit equally is of an earlier generation and in a nearer degree of relationship to the last male holder than the other, and the latter has now dropped out of the case. Pandu, the former, who is appellant here, is admitted to be Mahadeo's only reversionary heir under the Hindu Law, their common ancestor being one Bapuji, and the dispute in this case is in respect only of his right to inherit an occupancy holding of 48'78 acres which was a part of Mahadeo's property. As the second marriage of Mahadeo's widow took place in 1919, the case is governed by S. 46 of the Tenancy Act, 1898, and it is admitted that Pandu satisfies all the conditions of that section necessary to make him occupancy tenant of Mahadeo's holding except one: it is contended by the oppo-

(2) [1901] 14 C. P. L. R. 190 Cr.

(3) [1882] 8 Cal. 393=10 C. L. R. 239.

(4) [1898] 22 Bom. 549.

(5) [1881] 3 All. 749.

(6) [1919] 21 Bom. L. R. 276=50 I. C. 496=20 Cr. L. J. 320.

site party that their common ancestor Bapuji never "occupied" the holding according to the meaning of the concluding words of S. 46 (1).

It is admitted that an area of 72 acres, which included the whole of Mahadeo's occupancy holding, was held by Bapuji as sir. Sir was for the first time "definitely defined," as the learned District Judge puts it, in S. 3 (11) of Act 9 of 1883, and Bapuji died in 1870. But in the jamabandi of 1860 he is recorded as tenant of the whole 72 acres and also as hissedar malguzar, and from the other entries in that document it is clear that he had broken up all the land from waste, some of it 13 years and the rest 29 years before his death in 1870. The whole of it was therefore his sir in 1870 under both Cl. (b) and Cl. (c) of the Tenancy Act of 1883, though it was not then so recorded. Anyhow Bapuji's occupation of it was of the same character as if it had been sir and had been so recorded.

The question for decision then is whether a proprietor holding cultivating possession of sir land can be said to "occupy" that land for the purposes of S. 46 (1) of the Tenancy Act 1898. In the lower appellate Court it has been held that he cannot, and the plaintiff Pandu has appealed against that decision. Before that question is discussed it will be well to deal with another small matter arising out of a passage in the judgment of the lower appellate Court, which is perhaps only a suggestion of a view that is incorrect and not an expression of it. The learned Judge writes:

The fields in suit formed only part of the land held by Bapuji. Ex. P. 1 is the Settlement Khasra of 1860 and shows that Bapuji held 72 acres: the land in suit only amounts to 48.82 acres. Bapuji's holding was partitioned amongst the sons in 1880. In *Son Singh v. Thakur Ram* (1) it has been held that a tenant who has previously held a part only of an existing holding cannot be said to have occupied the present holding within the meaning of S. 46 of the Tenancy Act, though the converse of this might not apply. It was also held that where a partition is made a fresh holding is created.

For the judgment in *Son Singh v. Thakur Ram* (1), of which the title has been misquoted, I am responsible. In that case the question was whether one Anant could be regarded as having "occupied" an existing holding of about thirteen acres, of which up to

his death he had been tenant of about six. The passage towards the end of the judgment to which the learned judge refers is this:

If the whole of the present holding were a part of the original holding of Anant, then it might be argued with some show of reason that he did 'occupy' it within the meaning of S. 46 of the Tenancy Act, in spite of the opinion already expressed that each part of a holding after partition is an entirely new holding. But it cannot possibly be said that he occupied the present holding of 13.25 acres just because about half of it was included in the holding which he did occupy.

All that need be said is that the argument could have been said not only to have some show of reason behind it, but to be unanswerable, but it was unnecessary to put the matter so strongly for the purposes of that case.

On the main question whether occupation of sir land can be regarded as occupation for the purposes of S. 46 the learned District Judge has accepted the view expressed by the Hon'ble the Financial Commissioner in *Labchand v. Daulat Singh* (2), which is published in the old Revenue Manual under S. 46 of the Tenancy Act, 1898. In that case it was held that the word "occupy" in S. 46 means "to hold as an occupancy tenant" and does not include the occupation of sir land by a proprietor. The basis of the decision is summarized as follows:

A holding is a parcel of land held by a tenant of a landlord under one lease or one set of conditions. In the present case there was no holding prior to 1902, as there was then no relationship of tenant and landlord, and though a common ancestor may have occupied the land which now forms the holding, I hold that he cannot be said to have occupied the holding.

With great deference I would say that it is the word "occupy" that requires interpretation, not the word "holding." Whether the common ancestor was in possession of the present "holding" or not may be in question in such a case, as it was in *Son Singh v. Thakur Ram* (1) and was apparently supposed to be in this case. But that question did not arise in *Labchand v. Daulatsingh* (2); the question that did arise was whether that possession by the common ancestor was an "occupation" within the meaning of S. 46 (1) or not.

That the word "occupy" in that section does include occupation of sir land

(1) A. I. R. 1922 Nag. 21=18 N. L. R. 48.

(2) [1916] C. P. R. R. 83.

by a proprietor appears to me beyond doubt. Indeed its meaning may be wider still and may include some of the tenures which are mentioned in *Labchand v. Daulat Singh* (2) as indicating the absurdity of any extension of its meaning beyond that of possession by an occupancy tenant as such, but I am not concerned with that at present. In the judgment in *Shioram v. Tukaram* (3) I gave reasons, which on further examination still seem to me cogent, for holding that the occupancy right held by an ex-proprietor in land that was his sir is part of the right he held in the sir and not a right newly created in him by statute. In that view the holder of sir may be regarded as satisfying even the condition laid down in *Labchand v. Daulatsingh* (3); he does hold the land as an occupancy tenant, but he is also the proprietor of it. That this view of the dual capacity of the holder of sir is no recently evolved legal abstraction is made quite clear by the jamabandi for 1860 filed in this case, where Bapuji is recorded as proprietor and also as tenant in possession.

But there are further reasons for holding that the meaning of the word "occupy" in S. 46 (1) is not restricted to occupation in the capacity of an occupancy tenant, but extends at least to occupation of sir by a proprietor. The word is not used elsewhere in the Act, or as far as I am aware, in any other Act, in that restricted sense, and if the Legislature had meant that the ancestor had to be a person "who was an occupancy tenant of the holding," those words would have been used, instead of the unusual and clearly wider expression, "who occupied the holding".

The meaning, the Legislature intended the words to convey, is made if possible still clearer, at least in respect of sir land, by the use of the word "occupy" in the section of the same Act immediately before the one we are considering. S. 45 (1) speaks of a proprietor's right in the sir in his separate possession as "the right to "occupy" sir land as a proprietor", and the same word cannot have different meanings in different parts of the same Act, even if they are not consecutive sections.

The decree of the lower appellate Court will accordingly be set aside. In its place a decree will issue declaring

the plaintiff-appellant Pandu to be the occupancy tenant of the land in suit and ordering the third defendant, who is a Receiver appointed by a Magistrate under S. 146 of the Criminal Procedure Code, to put him in possession of it. The first two defendants will pay the costs of all the parties in all three Courts, including those of the Receiver if he incurred any; it would seem that he did not.

D.D.

Decree set aside.

A. I. R. 1927 Nagpur 247

FINDLAY, J. C.

Mukund Rao Deshmukh—Plaintiff—Appellant.

v.

Ragho Mali and another—Defendants—Respondents.

Second Appeal No. 203 of 1926, Decided on 9th March 1927, from the judgment of the Dist. J., Nagpur, D/- 12th January 1926, in Civil Appeal No. 190 of 1925.

Limitation Act, S. 5—Party misled by High Court's judgment—Time should be extended.

Discretion under S. 5 should be exercised in favour of a party who has been misled by a judgment of the High Court in computing the period of limitation. [P 248 C 1, 2]

W. R. Puranik—for Appellant.

R. N. Padhay—for Respondents.

Judgment.—The appeal of the present plaintiff in the Court of the District Judge, Nagpur, against the judgment and decree, dated 15th of August 1925, of the Subordinate Judge, 2nd class, Saoner, dismissing the plaintiff's suit for possession of an abadi site, has been held by the District Judge to have been time barred and has been dismissed accordingly. The original judgment and decree bore the date of the 15th of August 1925, while the decree was actually signed on the 19th idem. The appeal was filed on the 29th of September 1925, and allowing for twelve days spent in copying, it was thus two days over time. The learned District Judge was of opinion that the decision of Kinkhede, A. J. C., in *Pandu v. Rajeshwar* (1) was not applicable in the circumstances of the present case as the decree had actually been signed within the period of limitation.

(3) A. I. R. 1923 Nag. 93=19 N. L. R. 26.

(1) A. I. R. 1924 Nag. 271=20 N. L. R. 131.

The accuracy of the District Judge's conclusion in this connexion was contested in the grounds of appeal in this Court, but, on the appeal coming on for hearing, the pleader for the appellant stated that he did not desire to press this point in view of the fact that meanwhile the decision of Kinkhede, A. J. C., has been reconsidered by a Full Bench of this Court consisting of Kotval, O. J. C., Prideaux and Mitchell, A. J. Cs., in *Umda v. Rupchand* (2). It is a matter of common knowledge that before this Full Bench's decision was given, considerable doubt prevailed as to the exact extent to which Kinkhede, A. J. C., proposed to lay down the law in *Pandu v. Rajeswar* (1). That matter is, however, in my opinion and speaking with all deference, properly set at rest by the Full Bench decision in question.

It remains to decide, therefore, whether the present is a case where the benefit of S. 5 of the Limitation Act should be extended to the present appellant. It has been urged on his behalf that he or his pleader was under the impression, justifiably enough founded on the decision of Kinkhede, A. J. C., quoted above, that the date of the signing of the decree was the date from which limitation would begin to run and that, in those circumstances, he should be given the benefit of the discretion of the Court in his favour, particularly having regard to the explanation to S. 5.

On behalf of the respondents it is urged that the plaintiff obviously did not act with due diligence, that copies were not applied for until the 12th of September 1925, and although they were despatched on the 23rd idem, the appeal was not filed until six days later. It is impossible for this Court, however, on these facts to hold that the plaintiff did not show due diligence. He is a resident of an outside village in the Nagpur District and time must inevitably be lost in his communicating with his pleader, whether personally or by letter. The fact remains that in this case there is every reason for supposing that the plaintiff was misled by the judgment of Kinkhede, A. J. C., already referred to, and in these circumstances, I think the present case is one where it was the duty of the District Judge, who does not seem to have considered this aspect of the case at

all, to have exercised his discretion under S. 5 of the Limitation Act in favour of the appellant.

I accordingly condone the delay of two days which has occurred in the filing of this appeal. The result is that the judgment and decree of the lower appellate Court are reversed and the case is remanded to that Court for retrial of Civil Appeal No. 190 of 1925 on the merits with advertence to the above remarks. The costs of this appeal will follow the event.

D.D.

Case remanded.

A. I. R. 1927 Nagpur 248

FINDLAY, J. C.

Bhagwan Appa Wani—Plaintiff—Applicant.

v.

Shivalla Wani—Defendant—Non-applicant.

Civil Revision No. 282 of 1926, Decided on 4th March 1927, from the order of the Addl. Dist. J., Nagpur, D/- 24th July 1926, in Civil Suit No. 2 of 1926.

Court-fees Act, S. 7 (iv) (b)—Suit to enforce right to share in joint family property—Ad valorem fee must be paid.

Where a suit is one to enforce a right to share in any property on the ground that it is joint family property ad valorem fee must be paid: *A. I. R. 1924 Nag. 86, Foll.* [P 249 C 2]

The correct method of computation of Court-fees in suits where partition is claimed by a coparcener, who is in joint enjoyment of part of the property at the date of the suit, is to determine whether merely a change in the mode of possession is asked for or whether, in reality, the relief of ejectment is claimed. To arrive at a conclusion on such point, one has to look beneath the mere form and verbiage of the plaint and to arrive at what is its real substance. [P 249 C 1]

S. A. Ghadgay—for Applicant.

W. R. Puranik—for Non-applicant.

Order.—Only a question of Court-fees is involved in this case, the pertinent facts of which are sufficiently clear from the order of the Additional District Judge. I have been asked by the pleader for the plaintiff-applicant to hold that the principle laid down by Baker, J. C., in *Bhaddoo v. Saddoo* (1) is incorrect, and in this connexion reliance has been

(1) *A. I. R. 1924 Nag. 86=20 N. L. R. 43.*

(2) *A. I. R. 1927 Nag. 1 (F. B.).*

placed on the decision of Kinkhede, A. J. C., in *Manaji v. Sitaram* (2).

It is so far true that the correct method of computation of Court-fees in suits where partition is claimed by a coparcener, who is in joint enjoyment of part of the property at the date of the suit, is to determine whether merely a change in the mode of possession is asked for or whether, in reality, the relief of ejectment is claimed. To arrive at a conclusion on such point, one has, however, to look beneath the mere form and verbiage of the plaint and to arrive at what is its real substance. The present plaint is no doubt framed in a mode intended to suggest that both the plaintiff and defendant clearly are in possession of part of the joint property and that merely a change of the mode of enjoyment is desired. If, however, as in my opinion we must do in a case like the present, we have regard to the pleadings on record, it is perfectly clear that in the present case the suit is nothing more or less than one to enforce a right of share in any property on the ground that it is joint family property. From paragraph 5 of the written statement filed by the defendant on 17-4-1926, it is perfectly clear that the plaintiff must have been well aware that his allegation to the effect that he was a coparcener in the property held by the defendant had already been denied by defendant in a previous suit, and this point was found against the present plaintiff-appellant in that suit. In those circumstances, even if the plaintiff has chosen to ignore a patent fact like the above and to frame his suit in a manner which, on a superficial view, suggests that he is merely claiming a right to a different mode of enjoyment of the property, the Court, in my opinion, must have regard to what is, in effect, the real substance contained in the plaint as compared with the mere impression one might derive on a superficial view from the language used therein.

For my own part, I find myself in full agreement with the decision of Baker, J. C., in *Bhaddoo v. Saddoo* (1) quoted above. If it were to be for one moment admitted that the mere form and language of a plaint in a suit of this nature were to be the final test, it is

easily conceivable that in each and every suit to enforce a right to a share in any property on the ground that it is joint family property it would be possible so to frame the suit as to bring the same under Article 17 (vi) of the Second Schedule to the Court-fees Act.

There seems to be no reason to remand the case for a preliminary finding as to whether the position of the plaintiff or the defendant as regards the property in suit is correct or not. In paragraph 12 of the plaint it is admitted that the defendant refused the demand for partition of the property and it is equally clear from the defendant's written statement that the plaintiff's title thereto has already been adjudicated upon in a previous suit, the point being decided against him. The pleas offered by the defendant, which are on record, clearly make it possible to arrive at the right conclusion as to what is the real nature of the suit and, in my opinion, the Additional District Judge was, in those circumstances, correct in applying the decision in *Bhaddoo v. Saddoo* (1). I see no reason to doubt the soundness of that decision and in those circumstances it becomes unnecessary for me to discuss in detail the unreported decision of Kinkhede, A. J. C., quoted above.

The only point involved in this case, in reality, is whether this suit is one to enforce a right to a share in the property on the ground that it is joint family property. The present suit is and can obviously be only this, and, in the circumstances, ad valorem Court-fee was clearly leviable. The application fails and is dismissed. The applicant must bear the non-applicant's costs. Costs in the lower Court as already ordered. I fix Rs. 20/- as pleader's fees.

D.D. *Application dismissed.*

A. I. R. 1927 Nagpur 249

KOTVAL, A. J. C.

Abdul Gani—Plaintiff—Appellant.

v.

Sheikh Nizam and others—Defendants—Respondents.

First Appeal No. 35-B of 1925, Decided on 31st March 1927, from the decree of the 1st Cl. Sub-J. Morsi, D/- 17th December 1924, in Civil Suit No. 69 of 1924.

(2) A. I. R. 1924 Nag. 105.

Hindu Law—Damdupat—Original debtor non-Hindu—Debtor's liability transferred to Hindu creditor is not affected by Damdupat rule.

The rule of Damdupat to be applicable must have begun to apply at the time the original contract was made. It can do so only if the original debtor is a Hindu. Once it has begun to be applicable, it continues to be applicable to a Hindu assignee of the debtor, for the assignment does not put the creditor in a worse position than he expected to be in under his contract: 21 Bom. 33 and 21 Bom. 85, Appl.

[P 250 C 1 2]

A. V. Khare and W. B. Pendharkar—for Appellant.

M. B. Niyogi—for Respondents.

Judgment.—The only point for decision in this appeal is as to the application of the rule of Damdupat. The suit out of which this appeal arises was for foreclosure of a mortgage dated the 10th June 1912. The original mortgagors and mortgagees were Mahomedans; but after the date of the mortgage parts of the mortgaged property were sold by the mortgagors to two sets of Hindus and a part of it was sold at a Court sale to another set of Hindus. These three sets of Hindus and the Mahomedan mortgagors or their heirs are the defendants. The mortgage was for the principal sum of Rs. 2,500 and the claim with interest at the stipulated rate is for Rs. 9,551-6-0.

The Hindu defendants pleaded that the plaintiff could not recover more than Rs. 5,000, the Damdupat. The lower Court has held that the rule comes into force as soon as the debtor by assignment becomes a Hindu, and that as this happened on the 17th January 1917 before the amount of interest had become equal to the principal the plaintiff was entitled to no more than Rs. 5,000.

The rule of Damdupat which is a part of Hindu law did not apply between the original parties to the mortgage. The original mortgagee was entitled to interest exceeding the principal if it could be claimed under his contract. His rights under the contract cannot be detrimentally affected by his mortgagor transferring the equity of redemption to a Hindu: *Harilal Girdharlal v. Nagar Jeyram* (1).

In my opinion the rule to be applicable must have begun to apply at the time the original contract was made. It can do so only if the original debtor is a Hindu. In such case the creditor is aware of its applicability and he accepts

its consequences. Once it has begun to be applicable it continues to be applicable to a Hindu assignee of the debtor for the assignment does not put the creditor in a worse position, than he expected to be in, under his contract. It stops being applicable when the assignee is a non-Hindu; *Ali Saheb v. Shabji* (2), for the non-Hindu assignee who takes the assignment with the knowledge that the rule is not meant for the benefit of other than Hindu debtors cannot be said to be detrimentally affected by the stoppage. When it has not become applicable at the time of the original contract, as here, it cannot for the first time be made applicable as the result of an assignment to a Hindu. The result of allowing this would be to defeat the rights and expectations of the creditor under the original contract.

I hold that the rule of Damdupat does not apply in this case. In substitution of the decree of the lower Court a decree will be passed for the sum of Rs. 9,551 and interest at 12 per cent. per annum from the date of the suit till the date of payment which will be the 1st October 1927, and costs. Interest after the 1st October 1927 till realization will run at 9 per cent. per annum as already directed by the lower Court.

D.D.

Decree modified.

(2) (1897) 21 Bom. 85.

A. I. R. 1927 Nagpur 250

FINDLAY, J. C.

Nisarali—Accused—Applicant.

v.

Secretary, Municipal Committee, Nagpur—Non-Applicant.

Criminal Revision No. 39 of 1927, Decided on 9th March 1927, reported by the S. J., Nagpur, D/- 8th February 1927.

(a) *Criminal P. C., S. 539B—Use of statements not on oath is incurable irregularity.*

It is irregular, on local inspections, to take into account the evidence of witnesses not recorded on oath and the irregularity is not curable.

[P 251 C 1]

(b) *Criminal P. C., S. 263(h)—Reasons not recorded—Trial is bad.*

Where no reasons whatever for the conviction were recorded as required by S. 263 (h).

Held: that the trial was bad: A. I. R. 1923 Mad. 185, Rel. on.

[P 251 C 1]

Order.—This case has been reported under S. 438, Criminal P. C. by the Sessions Judge, Nagpur. Nisarali, the applicant in the Sessions Court, was convicted by the Honorary Magistrate, 1st class Nagpur, of an offence under S. 183 of the Municipal Act and was sentenced to a fine of Rs. 5. As the Sessions Judge points out, no reasons whatever for the finding are given. All that is on record, which is to the point at all, is a note of inspection of the spot and in it the Magistrate seems to have relied on statements made to him by casual people he met there—statements apparently not made on oath.

I have, on previous occasions, had occasion to point out that it is irregular, on such local inspections, to take into account the evidence of witnesses not recorded on oath. In this connexion, reference is invited to para. 4 of Judicial Commissioner's Criminal Circular No. 1-14.

From another point of view also, the present trial was obviously a bad one. No reasons whatever for the conviction were recorded as required by S. 263 (h) of the Criminal P. C., cf. *In re Dervish Hussain* (1).

The defects which have occurred as shown in the Sessions Judge's report, in this case are fundamental and go to the root of the trial. They cannot, from any point of view, be regarded as curable irregularities. The conviction and sentence in question are therefore, set aside and the complaint case will be reheard and tried by such other first class Magistrate, stipendiary or honorary, in Nagpur as the District Magistrate may select therefor. The fine, if paid, will be refunded.

D.D. Conviction set aside.

(1) A. I. R. 1923 Mad. 185=46 Mad. 253.

A. I. R. 1927 Nagpur 251

FINDLAY, J. C.

Mahomad Ayub and others—Applicants.

v.

Purshottam—Non-Applicant.

Civil Revision No. 99 of 1926, Decided on 11th March 1927, from the order of the Small Cause Court, J., Nagpur, D/- 3rd February 1926, in Misc. Judicial Case No. 110 of 1925.

Civil P. C., O. 22, R. 6—Application to set aside ex parte decree wrongly describing name of plaintiff who had died and whose legal representatives had been substituted—Application rejected on the ground of the wrong description—Rejection is improper—Civil P. C., O. 9, R. 13.

The original plaintiff, Ramdas, died during the trial of his suit, his son Purshottam being duly substituted in the plaint in his place. Eventually, ex parte decree was passed against the defendant who applied to have the ex parte decree set aside. By inadvertence, although the suit number and description were so far correctly given, the name of the plaintiff was shown as the original "Ramdas" then deceased. The Judge of the lower Court summarily rejected the application to have the ex parte decree set aside, without considering it on the merits, on the ground that just as a suit brought against a dead person is a nullity, so also the application to have the ex parte decree set aside was equally a nullity in view of the misdescription of the plaintiff in the application.

Held: that the mere fact that a misdescription of the plaintiff was given in the application for setting aside the ex parte decree, was no reason for refusing to hear the latter application on the merits. [P 252 C 1]

W. B. Pendharkar—for Applicants.

R. N. Padhay—for Non-Applicant.

Order.—In this case the original plaintiff, Ramdas, died during the trial of his suit, his son Purshottam being duly substituted in the plaint in his place. Eventually, ex parte decree was passed against the present defendant-applicant on 26-8-1925. On 19-9-1925 the present applicant applied to the lower Court to have the ex parte decree set aside. Doubtless, by inadvertence, although the suit number and description were so far correctly given, the name of the plaintiff was shown as the original "Ramdas" then deceased. The Judge of the lower Court summarily rejected the application to have the ex parte decree set aside, without considering it on the merits, on the ground that just as a suit brought against a dead person is a nullity, so also the application to have the ex parte decree set aside was equally a nullity in view of the misdescription of the plaintiff in the application. The decision of Wallis and Miller, JJ., in *Veerappa Chetty v. Tindal Ponnen* (1), was relied on in this connexion.

On behalf of the non-applicant, the order of the lower Court has been supported on the ground that S. 141 of the Civil P. C., makes the procedure provided

(1) [1908] 31 Mad. 86=17 M. L. J. 551.

therein for suits applicable so far as it can be made so in other civil proceedings such as we are concerned with in the present case.

I am wholly unable, however, to support the non-applicant's position or the view of the lower Court in this connexion. The suit had originally been filed by Ramdas; his son had been duly substituted and decrees had been so far validly passed in his favour. We are not here, however, concerned with a fresh suit but merely with an application to have the ex parte decree set aside and what occurred in the said application was that there was a mere misdescription of the plaintiffs given in the preamble to the application—a misdescription which left not the slightest doubt as to what decree it was sought to be set aside. This application was merely one, so to speak, in continuance of the already instituted civil suit—an application which it was within the power of the present applicant to present provided it was within the period of limitation.

The position is, in my opinion, entirely different on the point of principle and law involved from that of a plaintiff who comes to Court for the first time and sues a defendant who is already dead. In such a case, there is a fundamental defect of jurisdiction because, even at common law, the Courts have no jurisdiction to entertain a suit against a dead man. The mere fact of S. 141, Civil P. C., being on the statute book, does not, in my opinion, warrant the view arrived at by the lower Court; that provision is purely concerned with procedure. The legal principle that a dead man cannot be sued, is a point of substance altogether apart from procedure, and, in my view, the mere fact that a misdescription of the plaintiff was given in the application for setting aside the ex parte decree, was no reason for refusing to hear the latter application on the merits. The order of the lower Court, dated 3-2-1926, is accordingly set aside and the case will go back to that Court for disposal of the applicant's application, dated 19-9-1925, on the merits. Costs incurred in this Court by parties will follow the event.

D.D.

Order set aside.

* A. I. R. 1927 Nagpur 252

FINDLAY, J. C.

Laxman—Defendant—Applicant.

v.

Mt. Shevantibai — Plaintiff—Non-applicant.

Misc. Judicial Case No. 26-B of 1925, Decided on 18th December 1926, for review of the judgment, D/- 15th April 1925, in Second Appeal No. 237-B of 1924.

* Civil P. C., O. 47, R. 1—*Mistake of law—Wrongly applying law is no ground for review—Apparent mistake would include mistake as to existence of a statute on the date it was applied.*

Review cannot be granted on account of a mistake or error apparent on the face of the record when the alleged mistake or error is a wrong exposition of the law, e. g. when the judgment is based on a precedent which has been modified by a subsequent decision: A. I. R. 1924 Patna 250, Appl.; A. I. R. 1922 P. C. 112 and A. I. R. 1924 Mad. 98, Dist. [P 353 O 1]

Where the point of law is a debatable one at the most, the alleged error would imply that the Court applied the law wrongly, but that in itself affords no ground for review. The species of mistake of law which could be designated as one on the face of the record, would include, for example, a case where a Court, in giving its decision, held with reference to a certain set of events or circumstances that a particular statute applied on the date in question, whereas on the said date it was obvious from the record that a wholly different statute, or the same statute, radically amended with reference to the point at issue, applied. [P 253 C 2]

G. L. Sub'ed'ar—for Applicant.

A. V. Abhyankar and A. D. Mande—for Non-applicant.

Order.—In the present application, review is sought of my judgment in Second Appeal, No. 237 B of 1924, on the ground that the Court, having accepted the view of the District Judge that Mt. Radhi succeeded as full owner to the property concerned and took an absolute estate under the Bombay School of Hindu Law, and the plaintiff Shewantibai having succeeded in her turn as heir to her mother, and not as reversioner of Madhoji, I ought to have held as a necessary corollary thereto that the plaintiff was not entitled to maintain the suit as her mother Mt. Radhi had never in her lifetime brought any civil suit for setting aside the alienation and for possession of the subjects in dispute.

It has been urged on behalf of the applicant in this connexion that no question of limitation arises. Only the

mother, it is said, succeeded to the right of avoiding the transfer; this was a personal right which expired with her death and, therefore, the plaintiff Shewantibai succeeded to no such right.

On behalf of the non-applicant it was urged on the contrary that Shewantibai succeeded to all the rights which Mt. Radhi had and that, from this point of view, the question of limitation did arise.

Sufficient has, I think, been said to show that the alleged mistake or error of law cannot, by any strained process of interpretation or reasoning, be regarded as one apparent on the face of the record. The point, which the applicant has attempted to make, may or may not be an arguable one from his point of view, but most obviously the matter in question is of such a nature as not to fall under R. 1, O. 47, Civil P. C.

A preliminary objection was indeed taken on behalf of the non-applicant to the above effect, and I have been referred to the remarks of their Lordships of the Privy Council in *Chhajju Ram v. Neki* (1). That decision was, however, more concerned with the interpretation of the words "any other sufficient reason" in the rule just quoted, and their Lordships pointed out that the said words must be regarded as ejusdem generis with the preceding words.

A decision more to the point is to be found in *Garabini Kamarin v. Suraja Narain Singh* (2), where Dawson-Miller, C. J., pointed out that review cannot be granted as on account of a mistake or error apparent on the face of the record when the alleged mistake or error is a wrong exposition of the law, e. g. when the judgment is based on a precedent which has been modified by a subsequent decision. I am aware of the decision of Phillips and Rao, JJ., in *Murari Rao v. Balavanth Dikshit* (3). All that the latter decision amounts to is that the word "error" in R. 1 quoted above is not limited to one of fact and that an error of law committed by a Judge and apparent on a perusal of the record is a ground for granting a review. Even in the said judgment, however, the learned Justices remarked as follows :

(1) A. I. R. 1922 P. C. 112=3 Lah. 127=49 I. A. 144 (P. C.).

(2) A. I. R. 1924 Patna 250=3 Pat. 131.

(3) A. I. R. 1924 Mad. 98=46 Mad. 955.

We are of opinion that each case must be judged by itself and that where the error of law is such that it is clearly apparent on a perusal of the record, there is ground for granting a review.

In the present case, even if the Madras decision just quoted were to be accepted as being a correct exposition of the law applicable, I do not think that a case for review has been made out. The point raised by the applicant is obviously a debatable one, on which a good deal can be said on either side. But even if it be assumed that this Court had committed an error of law in the matter, such an error can, by no stretch of the imagination, be designated as one apparent on the face of the record. At the most, the alleged error would imply that this Court had applied the law wrongly, and that in itself affords no ground for review. It is no easy matter to describe *a priori* the species of mistake of law which could be designated as one on the face of the record. I personally opine that the class of mistake, to which such a description might properly be applied, would include, for example, a case where a Court, in giving its decision, held with reference to a certain set of events or circumstances that a particular statute applied on the date in question, whereas, on the said date, it was obvious from the record that a wholly different statute, or the same statute radically amended with reference to the point at issue applied.

The present case cannot, in my opinion come under R. 1, O. 47, Civil P. C., and the application is accordingly dismissed. This order also covers Miscellaneous Judicial Case No. 27-B of 1925, which was also heard along with the present one. The applicant must bear the non-applicant's costs in this proceeding.

D.D.

Application dismissed.

A. I. R. 1927 Nagpur 253

FINDLAY, J. C.

Sakharam Laxman Mahajan—Applicant.

v.

Vinayak Narayan Datar and others—Non-Applicants.

Civil Revision No. 365 of 1926, Decided on 6th April 1927, from the order of the Dist. J., Nagpur, D/- 12th October 1926, in Misc. Judicial Case No. 92 of 1924.

(a) *Succession Act 1925, Part 7, S. 195—Application to appoint curator—Disposal should not be postponed.*

Where an application is made for the appointment of a curator, in the ordinary nature of things it would be desirable then and there, by summary enquiry, to pass an order as to who should remain in possession, or as to a curator being appointed and the hearing of the application should not be postponed till the disposal of other connected proceedings, if any, although the parties themselves agree thereto.

[P 254, C 2]

(b) *Succession Act, 1925, Part 7—Order under—Revision lies.*

Although the order of a District Judge under Part 7 is not open to appeal or review, such an order is subject to revision: 34 Cal. 929, Rel. on.

[P 255, C 1]

(c) *Succession Act, 1925, Part 7, S. 195—Application for appointment of curator—High Court will not interfere with District Judge's discretion—Delay is a ground for refusing appointment—Civil P. C., S. 115.*

Where the District Judge held that in his discretion, in view of the delay which had occurred in applying, the case was not a suitable or advisable one for even appointing a curator, much less for putting the applicant in possession.

[P 255, C 1]

Held: that whether or not the discretion was wisely exercised, it is not the function of the High Court to determine.

Held: further that the District Judge was entitled to take into account the long delay which had occurred.

[P 255, C 1]

B. K. Bose and R. B. Gadgil—for Applicant.

S. R. Vaidya and R. W. Date—for Non-Applicants.

Order.—The facts of this case are sufficiently clear from the application itself as well as from the order, dated 12th October 1926, of the District Judge, Nagpur. In that order, the application made by the present applicant to be put in possession of the property in dispute, or to appoint a curator to take the said property in his charge, has been dismissed.

With some reluctance, I have come to the conclusion that this is not a case in which this Court should or could interfere in the peculiar circumstances thereof. The application in question, dated 30th October 1924, was made under Act 19 of 1841 and must now be held to fall under Part 7 of Act 39 of 1925 (Indian Succession Act). Rightly or wrongly, on 20th March 1925 the parties to the proceedings agreed that the case should pend until the connected probate proceedings were completed. On the 28th

August 1926 an order was passed in the probate proceedings, under which the will relied on by the non-applicants was found to be proved. Thereupon, the present applicant moved the District Judge to continue proceedings under Act 39 of 1925. The District Judge, however, in view of the delay which had occurred and relying, in particular, on the remarks of Stanyon, A. J. C., in *Khaja Kutubuddin v. Khaja Faizuddin* (1) as to the nature of proceedings under Act 19 of 1841, held that the exceptional provisions in question should not be enforced in the circumstances of this case and passed order accordingly. The District Judge also pointed out that the probate proceedings order did not amount to a judgment in rem within the meaning of S. 41 of the Indian Evidence Act, and he further pointed out that the present applicant had it in his power all through to file a regular suit with regard to the property in suit and had instead chosen to remain quiescent until after the order in the probate proceedings had been passed, when he once more desired to proceed with the application under Act 19 of 1841.

The order of the previous District Judge passed on 20th March 1925 was, in my opinion, a decidedly unfortunate one, even although the parties themselves agreed thereto. In the ordinary nature of things it would have been desirable then and there by summary enquiry to have passed an order as to who was to remain in possession, or as to a curator being appointed. The fact remains, however, that this was not done.

It is now urged on behalf of the applicant that much time will be lost before a suit can be filed and decided, that in the meantime, the non-applicants, or some of them are making away with or are likely to make away with, the property in dispute in whole or in part, and that it is necessary in the interests of justice that a Receiver should be appointed. On the other hand, on behalf of the non-applicants it is urged that even now the order in the probate proceedings is under consideration on appeal in this Court and that there has been no proof of damage or waste to the property by such of the non-applicants as are in possession thereof. Between these two standpoints, it is, how-

(1) [1903] 2 N. L. R. 72.

ever, in my opinion, not the province of this Court to have to make a decision. Although the order of a District Judge under Part 7 of Act 39 of 1925 is not open to appeal or review, it still remains true that such an order is subject to revision: cf. *Sato Koer v. Gopal Sahu* (2). In the circumstances of the present case, however, I find it impossible to hold that the District Judge has failed to exercise any jurisdiction vested in him, or has exercised a jurisdiction not vested in him, or has otherwise acted illegally or with material irregularity. What the learned District Judge has, in effect, held is that in his discretion, in view of the delay which has occurred, the case is not a suitable or advisable one for even appointing a curator, much less for putting the present applicant in possession. Whether or not the discretion was wisely exercised, it is not the function of this Court to determine, but it is obvious anyhow that the learned District Judge was entitled to take into account the long delay which had occurred before the original application was once more pressed.

Still further, it is undoubtedly true that the order already passed in the probate proceedings has not conferred a title upon the present applicant, although it may have put the non-applicants in an inferior position to what they formerly were. The fact also remains that the probate order in question is also at the present moment liable to be reversed or upset by this Court.

In the circumstances, therefore I find it impossible to hold that the District Judge failed to exercise a jurisdiction duly vested in him or acted illegally or with material irregularity in referring the applicant to his obvious remedy by way of a regular suit. In these circumstances, I am of opinion that this Court must, on the particular facts of this case, hold itself debarred from interfering by way of revision. The application is accordingly dismissed. The applicant must bear the non-applicants' costs. Costs in the lower Court as already ordered. I fix Rs. 50 as pleader's fees. Non-applicant 4 to be allowed a separate fee as well as Non-applicants 1 to 3.

G.B. *Application dismissed.*

(2) [1907] 34 Cal. 929=12 C.W. N. 65.

A. I. R. 1927 Nagpur 255

FINDLAY, J. C.

Jagdish Chandra Ray—Accused—Appellant.

v.

King-Emperor—Opposite Party.

Criminal Appeal No. 38 of 1927, decided on 3rd March 1927, from the judgment of the City Mag., Nagpur, D/- 15th December 1926, in Criminal Case No. 63 of 1925.

Criminal P. C., S. 408—Total term of imprisonment not exceeding four years—Other concurrent sentence of lesser period need not be considered—Criminal P. C., S. 35 (3).

Where the total term of imprisonment, to which an appellant has been sentenced, either by an Assistant Sessions Judge or by a S. 30 Magistrate, does not exceed four years the appeal undoubtedly lies to the Court of the Sessions Judge; (15 C. W. N. 734 and 17 C. W. N. 72, *not Foll*; *A.I.R. 1921 Cal. 152 Foll*.) The fact that other concurrent sentence of a lesser period has been passed against the appellant under provisions of the Penal Code, does not preclude the Sessions Court from dealing with the appeal: *A. I. R. 1921 Cal. 152, Foll*.

[P 255 C 2, P 256 C 1]

Further, appellate Court in such a matter is only concerned with the actual substantive sentence imposed, so far as the question of where the appeal lies is concerned, and the fact that the Magistrate, in determining the length of the sentence, took into account the length of time the appellant had been under trial, will not affect the question. [P 256 C 1]

S. C. Datta Chaudhri and V. D. Kale—for Appellant.

Judgment.—At a preliminary hearing of this appeal, which was fixed for hearing the appellant only on the merits, it has come to my notice that the present appeal lay in the Court of the Sessions Judge, Nagpur, having regard to the provision contained in S. 408, Criminal P. C. The fact that concurrent sentence of one year has been passed against the present appellant under other provisions of the penal law, does not preclude the Sessions Court from dealing with the appeal: cf. S. 35, sub-S. (3), Criminal P. C., and *Abdul Jabbar v. King Emperor* (1).

It has been suggested before me that the fact that the Magistrate, in determining the length of the sentence took into account the length of time the appellant had been under trial might affect the question of what Court of appeal has jurisdiction in this case. I am wholly unable to entertain this sug-

(1) *A. I. R. 1921 Cal. 152.*

gestion. This or any other appellate Court in such a matter is only concerned with the actual substantive sentence imposed, so far as the question of where the appeal lies is concerned. I am aware of the decisions in *Bepin Behary De v. Emperor* (2), and *Abdul Khalek v. King-Emperor* (3), but these decisions were dissented from in the latter case of 25 C. W. N. 613 quoted above, with which I respectfully agree, as also in *Aziz Sheikh v. Emperor* (4). Tudbal, J., in *Emperor v. Tulsi Ram* (5), took also a similar view, and there seems to me no doubt whatever that where the total term of imprisonment, to which an appellant has been sentenced either by an Assistant Sessions Judge or by a S. 30 Magistrate, does not exceed four years in the aggregate, the appeal undoubtedly lies to the Court of the Sessions Judge.

The result is that the appeal should be filed in the Court of the Sessions Judge, Nagpur who will take it on his file and dispose of it according to law. No question of limitation will arise, in the circumstances, in the Court of the Sessions Judge. Let the petition of appeal be returned accordingly.

G.B. *Petition of appeal returned.*

- (2) [1911] 15 C. W. N. 734=11 I. C. 255=15 C. L. J. 82.
- (3) [1913] 17 C. W. N. 72=17 I. C. 813.
- (4) [1913] 40 Cal. 631=19 I. C. 510=17 C. W. N. 825.
- (5) [1913] 35 All. 154=18 I. C. 679=11 A. L. J. 111.

A. I. R. 1927 Nagpur 256

HALLIFAX, A. J. C.

Harihar Rao—Plaintiff—Appellant.

v.

Salu Bai and another—Defendants—Respondents.

First Appeal No. 76 of 1926, Decided on 11th April 1927, from the order of the 1st Cl. Sub-J., Betul, D/- 9th February 1926, in Civil Suit No. 54 of 1925.

(a) *Suits Valuation Act, S. 9—Rules by Nagpur J. C's. Court—Suit for declaration of adoption to be invalid—Value of the suit is the value of the entire property, title to which is affected.*

A suit for declaration that an adoption is invalid should be treated as of the value of the property, of which title is affected, and not the title which is affected, both for calculation of ad valorem Court-fees payable and for purposes of jurisdiction. [P 257 C 2]

(b) *Civil P. C., S. 115—Order demanding further Court-fees is revisable—Civil P. C., S. 149.*

Revision will lie against an order demanding additional Court-fees. [P 257 C 2]

N. B. Niyogi and H. D. Mulak—for Appellant.

B. K. Bose and P. N. Rudra—for Respondents.

Judgment.—The first defendant Salu Bai is the widow of one Ganpat Rao Brahmin, who apparently was commonly known as Munshi Bhat, and the plaintiff Harihar Rao is his third cousin and his nearest living agnate. In the present suit he claimed a declaration of the invalidity of the adoption which Salu Bai purported to have made of Bhaskar Rao, the son of her own brother, who is the second defendant. On the plaint the Court-fee paid was Rs. 15, the sum then prescribed as a fixed fee under Cl. (v) of Art. 17 of Sch. II of the Court-fees Act in place of Rs. 10 by a temporary local amendment of the Act which has now expired. With the want of thought almost always shown in this matter the plaintiff described the value of the suit for the purposes of Court-fees as Rs. 15, which is absurd, though the more common and perhaps more absurd mistake is to take the fixed fee as an ad valorem fee and say that the value of the suit is Rs. 150 because that is the sum of which Rs. 15 is 10 per cent.

For determination of jurisdiction the suit was valued at Rs. 5,000. That is apparently the value put by the plaintiff on the immovable property that passes from the first to the second defendant if the adoption is valid, not the value of his interest in it, that is his chance of getting it if the adoption is invalid, which is of course less. The defendants, as usual, raised the short-sighted plea that an ad valorem Court-fee had to be paid on the value of the property, which they asserted and endeavoured to prove was Rs. 15,000.

On enquiry it was found that the value of the immovable property that belonged to Munshi Bhat, now in the possession of the defendants, is Rs. 6,800 and that of the hereditary office of Joshi held by him is Rs. 5. The annual income of that office is said in this Court to be between Rs. 50 and Rs. 75. It may be less than that, but it cannot be less than one rupee, which it would have to be for the

office to be worth no more than Rs. 5. Also, there is no mention of moveable property of which there is presumably some. However, the value of Munshi Bhat's property now held by one or both of the defendants Salu Bai and Bhaskar Rao, is, for the purposes of this case, Rs. 6,805.

In accordance with the rules made by this Court under S. 9 of the Suits Valuation Act and published in Civil Circular II. 8, it was held that the proper Court-fee was that calculated on Rs. 6,805 ad valorem. The plaintiff refused to make good the deficiency within the time allowed by the Court and his plaint was accordingly rejected. Against this rejection, which is a decree, he is now appealing. The petition of appeal sets out the contention that the proper Court-fee is the fixed fee of Rs. 15, not an ad valorem fee on Rs. 6,805, without stating any reason to support it. The reason first stated in argument was that the making of the rule in question went beyond the powers of this Court, but that was abandoned as obviously untenable; it was admitted that the rule is a rule of law and applies to this case, but contended that under it the amount payable is an ad valorem fee on Rs. 400, not on Rs. 6,805. No clear reason was stated to support this contention, but what seemed to be suggested was that the proviso to the rule gives rise to so many anomalies that it cannot be followed.

The rule in question says:

Suits of the following classes shall.....be treated as if the subject-matter of such suits were of the value of four hundred rupees;

(1) Suits for the restitution of conjugal rights for declaration of the validity of a marriage, or for a divorce;

(2) Suits for the custody or guardianship of a minor;

(3) Suits for a declaration that an adoption is valid or invalid.

Provided that if a suit for a declaration that an adoption is valid or invalid affects a title to property, then the value of that property if it exceeds Rs. 400, shall be deemed to be the value of the subject-matter of the suit.

Any attempt to interpret or apply this rule shows that it does not express the meaning it was intended to convey. If we take Cl. (3) and the proviso alone, it will appear, in the first place, that the proviso refers to the title affected by the suit, whosoever it may be, not to the plaintiff's title, which is the subject-matter of the dispute between the par-

ties. With some straining of the meaning of the words, it might be said that the title of which the rule speaks is the plaintiff's title, but then it goes on to say that the valuation is to be that of the property of which the title is affected, not that of the title which is affected.

It is hard if not impossible to imagine a suit for a declaration that an adoption is valid or invalid (or even one for a declaration of the validity of a marriage or one for a divorce) that does not "affect" a title to property. The only case mentioned as of that kind is *Kalova v. Padapa* (1) decided by the Bombay High Court in 1876. But an examination of the judgment shows that the declaration sought would affect property precisely to the same extent and in the same way as it will here.

But even if such a suit not affecting a title to property had ever been filed or could even be imagined, it can be taken as fairly certain that no such suit affecting property is worth less than Rs. 400. The whole effect of Cl. (3) and the proviso then is that the value of such a suit shall be the value of the property affected, with a minimum so low that in practice it has no meaning at all. If that had been what was intended the rule would certainly not have been framed in that way.

Another anomaly arising out of this part of the rule, so great that it is hardly possible it could have been intended, is this. In its effect on property the present suit is exactly the same as one for a declaration of the invalidity after the death of the widow of a gift made by her. But in this case the Court-fee has to be calculated on the value of the property held by the widow at present with a minimum of Rs. 400, and the value for jurisdiction is the same, whereas in the other there is a fixed Court-fee of Rs. 10 (which was Rs. 15 at the time this suit was filed), and the jurisdiction is governed by the plaintiff's estimate of the value of his chance of succeeding to the property, which is considerably less than the value of the property itself.

Further and even greater difficulties arise out of the application of the rule in the only permissible way, that is according to the plain meaning of its words, if we take the case of an adoption

(1) [1877] 1 Bom. 248.

made by a Hindu himself, not by his widow. If a Hindu sued his father, who said he was illegitimate, for a declaration that the adoption made by the father was invalid because he was legitimate. Court-fees would have to be calculated on the whole of the father's property, including his half-share and his self-acquired property. That is obviously unjust as the father could give his half share and his self-acquired property to the person he had adopted on the day after the adoption was declared invalid.

Another minor difficulty arises from the fact that the words of the proviso include moveable property. That is in practice usually, if not always, left out of consideration, as was done in this case, but the omission is clearly a breach of the rule as it stands.

Still further anomalies become apparent if we consider the whole of the rule. All suits of the first two classes, whether they affect a title to property or not and however directly they affect it, are to be treated as of the value of Rs. 400 for the calculation of Court-fees and also, under S. 8 of the Suits Valuation Act, for the determination of jurisdiction. The result is that suits of the first two classes must be tried by a Court of the lowest jurisdiction, unless they include a prayer for consequential relief, whatever the value of the property or of the title affected by them may be. It might well be argued even that the proviso by necessary implication lays down that the value of any consequential relief claimed shall not be taken into consideration for either purpose. But even if this is not so, the effect of the whole rule undoubtedly is that if the admitted son of the owner of the largest impartible estate in the Central Provinces by a lady not admitted to be his father's wife, sued that father for a declaration of the validity of his mother's marriage, the case would be tried in a Court of the lowest jurisdiction.

The fact that the three classes of suits are included in a single rule puts it beyond doubt that the intention was to make one rule for all three with some differentiation of the third, though the reason for that differentiation is not apparent. But it has been shown that the rule for the third class is entirely different from that for the rest in every way. The only point of similarity

between them is that a sum of Rs. 400 is mentioned in both. In one that sum is a meaningless minimum for a valuation depending on ill defined property and in the other a definitely fixed valuation.

But however many anomalies and apparent injustices may arise out of the rule as it stands and however difficult it may be to apply it to a particular case we are not concerned with the law as we think it was intended to be or ought to be. We are concerned only with the law as it is, and the law, as it is, lays down that this suit is to be treated as of the value of Rs. 6805 both for the calculation of the ad valorem Court-fee payable and for the determination of jurisdiction. Indeed even that valuation is probably too low, according to the rule, because there is almost certainly a good deal of moveable property no less "affected" than the immovable, but that must now be disregarded for the purposes of this case.

Instead of asking for an extension of time for the payment of the Court-fee demanded, during which he could get the correctness of the demand tested by an application for revision, the plaintiff has followed the usual course of refusing to pay, allowing his plaint to be rejected and appealing against the order of rejection. That would be unwise even if it appeared fairly certain that the demand for the extra Court-fee is wrong, as the finding that it is not, means that the rejection of the plaint was right and indeed inevitable. It has recently been held in the Allahabad High Court that a demand for further Court-fees is not within the terms of S. 115, Civil P. C. The contrary view has however been held in this Court for many years, and applications for revision of such orders have always been accepted as a matter of course.

The appeal must therefore be dismissed for the reason that the decree of the lower Court is correct. It must also, like the suit, be rejected for deficiency in Court-fees. Under the mistake that the appeal was against the demand for further Court-fees, not against the decree rejecting the plaint, it was ordered that payment should be made of an ad valorem fee on the further fee demanded in the lower Court. The appeal was however against the decree and the fee should have been ad valorem on Rs. 6805.

For all these reasons it will be dismissed and the appellant will be ordered to pay all the costs of the respondents, which will include a pleader's fee of thirty rupees.

G.B.

Appeal dismissed.

A. I. R. 1927 Nagpur 259

FINDLAY, J. C.

Madhorao Narayanrao Ghatate —
Plaintiff—Appellant.

v.

Deepchand and others—Defendants—
Respondents.

First Appeal No. 83 of 1926, Decided on 3rd March 1927, from the decree of the Addl. Dist. J., Nagpur, D/- 30th June 1924, in Civil Suit No. 25 of 1921.

(a) *Limitation Act, S. 25—Bond or deed—Time for payment—Computation should be according to Gregorian calendar unless specifically otherwise mentioned—Use of Marathi month for purposes of payment of interest—There is no presumption that time for payment is also to be calculated according to Marathi calendar.*

If, in the deed or bond concerned, there is a clear statement that repayments will be made on a particular Marathi month, or after so many months calculated according to the Marathi calendar, then S. 25 will not affect the date fixed for payment. But the circumstances that a bond bears an Indian date cannot be used in order to draw an inference regarding the meaning of the word "month" used in subsequent clauses in the bond. Therefore, the mere fact that the rate of interest was to be at 1 per cent per mensem for each Marathi month, is an insufficient basis on which to build the theory that for purposes of repayments also the period was to be calculated on the basis of Marathi months: 11 C. P. L. R. 91 and 6 Bom. 83, *Rel. on*; 36 Cal. 516, *Dist.*

[P 261 C 2]

(b) *Specific Relief Act, S. 31—Identity of property covered by the deed not doubtful—Mistake in description of Tahsil in which property is situate—S. 31 does not apply.*

Where a deed gives a detailed description of the property covered by it, and there is no doubt as to the identity of the property, S. 31 will not apply merely because the Tahsil in which the property is situate is wrongly described.

[P 262 C 1]

M. R. Bobde and A. D. Mande—for
Appellant.

N. G. Bose, V. Bose and M. R. Indurkar—for Respondents.

Judgment.—The plaintiff-appellant, *Madhorao Narayanrao Ghatate's* suit on a simple mortgage-deed, dated 29-7-1908, for Rs. 8,500-0-0 has been

dismissed by the lower Court. The original defendants were *Kesrichand, Deepchand and Sarup Singh*, and these are now represented in appeal, owing to the death of *Kesrichand*, by *Deepchand, Motilal, Pratapchand and Sarup Singh*. The various pleas offered by the parties in the case are sufficiently set forth in the lower Court's judgment. On the issues which arose therefrom, the lower Court came to the following findings:

(i) that the mortgage-deed in suit (P. 1) was duly executed and attested and consideration duly passed thereunder and its registration had been properly carried through;

(ii) that *Narayanrao Ghatate* had, by the execution of a will (P. 75), authorised his wife *Mt. Chandrabhaga Bai* to adopt a son and the plaintiff was duly adopted by her;

(iii) that the property mortgaged was not the ancestral property of *Deepchand and Sarup Singh*.

(iv) that the money had been lent after due enquiry as to the existence of legal necessity and that the debt was incurred for such legal necessity and was binding on the second defendant, but, in any event, the debt was incurred by the manager of a trading firm and no question, in reality, could arise as to legal necessity;

(v) that the interest charged is not penal and is legitimately claimed;

(vi) that the suit is barred by time;

(viii) that no valid charge was created against the villages *Sundarvadi and Songuda*; and

(ix) that no repayments had been made as alleged by the Defendant No. 1.

On the finding, however, that the suit was barred by time, the plaintiff's suit was necessarily dismissed.

We are not now concerned with many of the pleas which were offered in the lower Court and we pass direct to consider the questions which have been agitated in this appeal. The central and most important matter in this connexion relates to the question whether the suit is barred by time or not. Under the terms of the deed, compound interest at 1 per cent per mensem was to be paid until satisfaction and the first instalment of Rs. 4,000 was to be paid within 12 months from the date of execution, viz. 29th July 1908; at the same time interest up to that date on the whole amount was to be payable; 12 months thereafter, the balance of Rs. 4,500 plus the further interest accrued was to be payable. The crucial clauses in the deed in this connexion may be translated as follows:

I will be paying compound interest on this amount, at Re. 1, per cent per mensem, the months to be counted according to the Marathi *mitis*. As to agreement about repaying the said amount, I will within 12 months from this day

pay Rs. 4,000 towards the principal plus the interest on the entire amount, whatever it may be on calculation, and I will, within 12 months next, pay off the remaining Rs. 4,500 plus interest on the amount that may have remained as balance, whatever it may come to on making account. I will, as stated above, repay the entire amount within 2 years. In case I fail to pay the amounts on the above stipulated dates I will pay interest at Re. 1-4-0 per cent per mensem on the entire amount from date of default up to the date of complete satisfaction, with yearly rests, i. e., I will allow that amount of interest which will become due at the end of a twelve months' period to be considered as principal and I will pay interest on this amount also. In this manner I will get account made every twelve months and I will pay compound interest—interest on the principal and interest on the amount of interest. If I make a default of the first stipulated date, then I will pay your entire amount in one lump, and, as long as I shall be unable to repay your entire amount in one lump, I will pay the interest due to you, in accordance with the above stated condition, without raising any objection in the above stated manner. I will not then raise the objection that I had stipulated to pay interest up to the dates fixed for repayments, or the objection about a lower rate of interest, or any objection whatsoever. When I shall make a repayment you should first deduct the amount due for interest and then you should credit the remaining amount as repaid towards the principal.

The learned Additional District Judge has, in his finding on Issue No. 9, held that there was an express stipulation for the payment of interest with reference to the Marathi Miti and that exigibility also must be held to have had reference to that miti. In arriving at that conclusion, he relied on the decision of *Beverly and Ameer Ali, JJ.*, in *Latifunnessa v. Dhan Kunwar* (1). The ratio decidendi of the case just quoted was that the proper test to apply to such a question was what was the intention of the parties, and the Additional District Judge held that, in the circumstances of this case, the intention of the parties must have been that just as the Marathi miti was to be used for the purpose of calculation of interest, so also that miti would apply to the repayments. We are unable to agree that any such presumption arises under the terms of the mortgage-deed in suit. It is perfectly obvious that undoubtedly by oversight the parties failed to notice the difficulty which would arise in this connexion and all that one can predicate of the document is that the parties had arrived at a specific agreement that, for the purpose of calculating compound interest, months

should be taken according to the Marathi calendar. Such a stipulation was neither an unlikely nor an unreasonable one in view of the fact that some Marathi years contain 13 months, and thus in the calendar year the plaintiff would stand to lose some interest had not such a provision been inserted. It does not, however, seem to us to be at all clear that there was any agreement or distinct intention on the part of the parties that months for the purpose of repayments were to be calculated in the same way. If the Marathi calendar were to be applied in this connexion, certain terms of the bond regarding these dates become inconsistent.

In July 1909, when the first payment fell due, an intercalary month, *Adhik Shrawan*, intervened, commencing on the 18th of July, followed by the ordinary Shrawan month on the 17th of August; 24 months thus would not make up two years according to the Marathi calendar, yet in the mortgage deed the sentence appears: "I will, as stated above, repay the entire amount within 2 years." No attempt has thus been made in the deed to provide for the contingency of this intercalary month. In the circumstances, we think the case is undoubtedly one where recourse must be had to the provision contained in S. 25 of the Indian Limitation Act. The illustrations to the said provision are peculiarly apposite in the circumstances of the present case. If a Hindu makes a promissory note bearing a native date only and payable four months thereafter, the period of limitation applicable to a suit on the note runs from the expiration of four months after the said date, the months are to be calculated according to the Gregorian calendar. In *Bhaiyalal Wani v. Jamnadas Potdar* (2) the bond in suit contained a provision that the loan was to be repaid within 12 months, that is, up to Baisakh 1302 Fasli. In that case too, as in the present one, there was some indication that the parties may have intended to refer to the Marathi calendar, but Ismay, J. C., held that limitation must be calculated according to the 12 calendar months.

In *Rungo Bujaji v. Babaji* (3) a similar stipulation occurred, and a precisely similar view was taken of the law appli-

(1) [1897] 24 Cal. 392.

(2) [1898] 11 C. P. L. R. 91.

(3) [1881] 6 Bom. 83.

cable by Westropp, C. J., and Birdwood, J. The former Judge remarked in the said case :

The legislation in S. 25 of Act 15 of 1877 is absolute. There is no saving of cases in which it appears on the face of the contract that lunar months were intended by the parties.

In *Latifunnessa v. Dhan Kunwar* (1), the very case relied on by the lower Court in connexion with its decision on this matter, the learned Judges seem to have entertained no doubt that the period of six years had to be calculated according to the Gregorian calendar. The bond there concerned contained a specific reference to the month of Jeyth 1289 Fasli and, as S. 25 of the Limitation Act might not affect such a reference, the judges felt some doubt as to what date was intended by the parties. It does not seem to us that in the present case any such doubt exists, there being no statement that the amount will be repaid in any specific month.

The respondents have placed reliance on *South British Fire and Marine Insurance Co. v. Brojo Nath* (4). In that case there was no contention that the word "month" in the contract referred to any calendar other than the Gregorian calendar. The contention was that the word meant a lunar month of 28 days. The learned Chief Justice held that S. 25 of the Limitation Act was not intended to apply to a contention of this nature and had, therefore, no bearing on the question of what is the meaning of the word "month" in a contract drawn in the English language. The section, he held, laid down that when it was clear that a month according to some calendar is meant, the word "month" should be interpreted with reference to the Gregorian calendar. This ruling then has no application to the present case and gives no help to the respondents. The respondents also cited *Roshan Lal v. Chaudhri Bashir Ahmad* (5). The deed therein considered made a clear statement that interest should be paid every six months according to the Hindi calendar. Their Lordships interpreted this stipulation as meaning that interest should be paid on a particular date according to the Hindi calendar, and calculated limitation from this date.

We can find nothing in any of the decisions we have examined which, in reality, supports the contention urged on behalf of the respondents in this connexion. The utmost that can be deduced from these decisions in their favour is that if, in the deed or bond concerned there is a clear statement that repayments will be made on a particular Marathi month, or after so many months, calculated according to the Marathi calendar, then S. 25 of the Indian Limitation Act will not affect the date fixed for payment. As we have already pointed out, no such distinct stipulation exists in the present case. It is, moreover, clear to us from the illustration to S. 25 of the Limitation Act that the circumstances that the bond bears an Indian date cannot be used in order to draw an inference regarding the meaning of the word "month" used in the subsequent clauses, and we are of opinion that in the present instance the mere fact that the rate of interest was to be at 1 per cent. per mensem for each Marathi month is an insufficient basis on which to build the theory that repayment was also to be made after 12 Marathi months. There being no clear or distinct indication, moreover, that repayment was to be made on a particular Marathi date, the word "month" in the clause in the deed requiring repayment must, in our opinion, be calculated according to the Gregorian calendar in accordance with the express provision laid down in the section of the Limitation Act already referred to. It follows, therefore, that on this view the suit was not barred by time.

The respondents have laid much stress on the apparently informal endorsement on the back of the mortgage-deed in suit—an endorsement proved to have been made by Narayan Ghatate, the son of the original mortgagee. There is nothing to show at what time this endorsement was made, nor is there any reason to suppose that Narayana Rao Ghatate had any special knowledge of the intention of the contract of the parties to the contract at the time the deed was executed. The endorsement in question appears to be a mere note intended to summarize provisions of the deed which might be required for ready reference and the most its evidential value would amount to is that the said note shows how

(4) [1909] 36 Cal. 516=2 I. C. 573=13 C. W. N. 425.

(5) A. I. R. 1925 All. 138=47 All. 66.

Narayanrao Ghatate interpreted it. That his interpretation was incorrect, is, in our opinion, of no importance and the note in question clearly cannot prejudice the present plaintiff. We do not find it necessary in view of the above findings to discuss at length the 2nd additional ground of appeal filed on 18th November 1925 to the effect that the repayments appropriated as per the specific agreement in the mortgage deed (P. 1) towards interest as such. in any event, saved limitation under S. 20 of the Limitation Act, but, in the circumstances of this case, we are of opinion that in this connexion also limitation would have been so saved : cf. *Gopal v. Govind* (6)

The only other ground of appeal we are concerned with relates to the liability of Defendant No. 3 with reference to the villages of Sundarvadi and Songuda. This defendant purchased these two villages on 8-12-1908. His position was that the villages are actually situated in the Baihar Tahsil of the Balaghat District and not in the Balaghat Tahsil as wrongly described in the mortgage-deed in suit. The Additional District Judge held that this incorrect description led to the Defendant No. 3 being misled and that as he had paid a full price for the villages in question without being aware of their hypothecation, he should not suffer therefor. We are, however, of opinion that, as the deed gives a detailed description of the villages, and as it is clear from the deed that they were situated in the Balaghat District, no possible doubt could arise as regards these two subjects. The mention of any tahsil was certainly unnecessary and the incorrect mention of the Balaghat Tahsil does not render the identity of the villages obscure. The said mention of the Balaghat Tahsil must, in short, be treated as a mere piece of surplusage. There was, in our opinion, therefore, no necessity for rectification of the mortgage-deed and S. 31 of the Specific Relief Act had no application. The case would have been entirely different had the mistake in any way induced the purchaser to buy the villages, but this is not so in the present case. The Defendant No. 3 pleaded that he had made enquiries, but admittedly has adduced no evidence to prove this. In the circumstances we

are of opinion that the mistake in the mortgage-deed cannot be allowed to prevent the mortgagee from obtaining a decree against Defendant No. 3 also.

It is urged by the respondents that the Registration authorities omitted to send a copy of the deed to the Balaghat Registration Officer. In paragraph 6 of his written statement, dated 5-11-1921, the Defendant No. 3 alleged that he searched the Registration Office, and he apparently means the Balaghat one. This allegation is supported by no evidence. As it is not proved that he did have a search made in the said Registration Office, the omission of the Registration authorities to send a copy of the mortgage-deed there (if there was any such omission), did not prejudice him in any way. Holding as we do, therefore, that S. 31 of the Specific Relief Act can have no application in this matter, even if the Defendant No. 3 paid full value for the property as a result of being misled, actively or passively, by his vendor, this cannot affect the plaintiff's rights under the mortgage.

For the above reasons, therefore, the judgment and decree appealed against are reversed and a decree for sale of the mortgaged property as set forth in R. 4, O. 34 of the Civil P. C., will issue in favour of the plaintiff against all the four respondents. Six months from date of this judgment will be allowed for repayment. The amount accrued due on the date of the suit was Rupees 36,107-2-3. Compound interest (pendente lite) and up to the date fixed for payment will be allowed at Re. 1 per cent. per mensem and thereafter interest on the amount payable at 8 annas per cent per mensem. The defendant-respondent will also bear the plaintiff-appellant's costs in both Courts.

G.B.

Appeal allowed.

A. I. R. 1927 Nagpur 262

FINDLAY, J. C.

Balaji and others—Creditors—Appellants.

v.

Gopal Mali—Insolvent—Respondent.

Second Appeal No. 160-B of 1926, Decided on 21st March 1927, from the judgment of the Dist. J., Amraoti, D/- 26th February 1926, in Civil Appeal No. 6 of 1925.

(a) *Limitation Act, Art. 181*—Article refers to applications under Civil P. C.

Article 181 must be construed as referring to ejusdem generis applications with those in preceding articles, viz. Civil P. C. ones.

[P 263 O 2]

(b) *Civil P. C., O. 21*—Sale in insolvency—O. 21 applies and application for setting aside a sale is governed by Art. 166.

The provisions of O. 21 of the Civil P. C., are applicable to insolvency proceedings, and the limitation applicable to a petition for setting aside a sale in an insolvency proceeding must be thirty days as laid down in S. 21 read with Art. 166 : A. I. R. 1921 Nag. 25, *Foll.*

[P 263 C 2]

(c) *Civil P. C., S. 151*—Other remedy open—Recourse to S. 151 should not be had.

Where the applicants had their remedy otherwise provided and had neglected to make use of it, recourse to inherent powers should not be had : A. I. R. 1924 All. 446, *Ref.* [P 264 C 1]

G. R. Deshmukh and M. B. Marathe—
for Appellants.

M. R. Bobde—for Respondent.

Judgment.—One Gunaji, the father of the respondent, Gopal, was adjudged an insolvent on 3rd July 1922 and was given a year for applying for discharge. He applied accordingly on 26th June 1923. On 28th August 1922, a schedule containing the names of five creditors had been prepared ; one of these was the father of the present appellants, by name Bhanudas. They applied on 3rd November 1923 to be added and attacked a sale of property that had been held and was pending for confirmation. On 16th September 1923 the Court, under circumstances which are clear from the lower appellate Court's judgment ordered the property to be sold free from the mortgage concerned. On 15th January 1923, Bhanudas died. The sale was held on 14th February 1923, and was confirmed on 7th April 1923, and Gopal, the auction-purchaser and son of the insolvent, was given his sale certificate on 13th June 1923. Meanwhile, a house was sold and this sale was confirmed on 18th August 1923, but, before this, the insolvent applied for discharge. On 3rd November 1923, the present appellants filed their application of 3rd November 1923 referred to above. The question involved, therefore, is whether this application was time-barred or not. The appellants in this connexion rely on Article 181 of the Schedule to the Limitation Act, while the respondent relies on Article 166. The Judge of the first Court remarked that, if the ap-

plication in question had been one under the Civil P. C., Article 177, would primarily have applied but there would have been no extension of time in respect of minority of Shanker, one of the appellants, as under S. 6 (1) of the Limitation Act no question of filing a suit or an application for execution of a decree was involved. He further pointed out that S. 78 of the Provincial Insolvency Act restricted the application of the Limitation Act, in insolvency proceedings. The Subordinate Judge, after considering certain case law on the point, decided that the Limitation Act as such, did not apply ; but he held that he had inherent powers to admit the application, particularly as a minor was concerned. On further considering the merits of the case he ordered the sale to be set aside and refused to discharge the insolvent.

The District Judge held that the sons of Bhanudas were entitled to be brought on the schedule in place of their father, the change being a mere substitution and not the addition of a new creditor or creditors. On the further question, whether they were, even on 3rd November 1923, entitled to attack the sale, he held that the application lay, if at all, under Article 166 read with O. 21 of the Civil P. C., the limitation in either case being thirty days.

For my own part, I cannot see the slightest possibility of applying Article, 181 to an application of the kind we are concerned with. The law would be in an anomalous condition indeed if a period of three years were to be allowed for setting aside a sale in an insolvency proceeding as compared with thirty days in a sale under the Civil P. C., Article 181 must be construed as referring to ejusdem generis applications with those in preceding articles, viz. Civil P. C. ones. Now, accepting the principle laid down in *Manakchand v. Ibrahim* (1), that the provisions of O. 21 of the Civil P. C. are applicable to insolvency proceedings, it seems to me indubitable that the limitation applicable to a petition for setting aside a sale in an insolvency proceeding must be thirty days as laid down in O. 21 read with Article 166 of the Schedule to the Limitation Act. Nor can I see that any question of an extension of time on account of fraud

(1) A. I. R. 1921 Nag. 25=17 N. L. R. 49.

can arise in the circumstances of this case. The present appellants were even too late to be substituted as legal representatives had the proceeding been a civil Court suit, and I can find no *prima facie* ground for holding that they were entitled to contest the sale at the late stage they did.

I may add that the Judge of the first Court was clearly wrong in having recourse to the inherent powers of the Court in the way he did. The appellants had their remedy otherwise provided and had neglected to make use of it: (cf. *Joshi Shib Prakash v. Jhinguria* (2).

These findings govern the appeal which is dismissed. Appellants must bear the respondent's costs. Costs in the lower Courts as already ordered. I fix Rs. 40 as pleaders' fees.

D.D. Appeal dismissed.

(2) A. I. R. 1924 All. 446=45 All. 144.

A. I. R. 1927 Nagpur 264

FINDLAY, J. C. AND MACNAIR, OFFG.
A. J. C.,

Vinayak Narayan Datar—Plaintiff—
Appellant.

v.

Sakharam Laxman Mahajan—Defendant—Respondent.

Misc. Appeal No. 42 of 1926, Decided on 23rd April 1927, against the judgment of the Addl. Dist. J., Nagpur, D/- 28th August 1926, in Civil Suit No. 7 of 1925.

Will—Proof—Writer getting great benefit under the will—Evidence in support of will must be vigilantly examined.

Where the party who writes a will has to take very great benefits under it, that circumstance of itself must put a Court in guard and cause it to be vigilant in examining the evidence in support of the instrument.

[P 266, C 2; P 267, C 1]

S. R. Vaidya—for Appellant.

B. K. Bose and R. B. Gadgil—for Respondent.

Judgment.—The appellant Vinayak's application for probate of a document alleged to be the last will and testament of Vithal Balwant Mahajan of Nagpur, who died at Umarkhed (Yeotmal) on the 18th September 1924, has been dismissed by the Additional District Judge, Nagpur. The appellant is a natural brother of the deceased. The application was opposed by the present respondent Sakharam who

denied that the will in question, which is alleged to have been executed on the 10th September 1924, two days before the testator died, was ever executed by him. It was also denied that, in any event, the testator was in a disposing state of mind at the time when the alleged will is said to have been executed by him, and the contention was frankly put forward that the will in question was a forgery, which had been effected as a result of the conspiracy between the present appellant Vinayak Narayan Datar, Mr. S. G. Gadgil, Pleader, and Bhaskar Sadasheo Kelkar, alias Aba, with a view to appropriating the estate for the benefit of the persons who are legatees under the will.

It is unnecessary here to repeat the various pleadings which were put forward on either side by the parties to this litigation, but, on the issues which arose on these pleadings, the Additional District Judge gave the following findings:

(i) that it had not been proved that the will was in reality executed by Vithal Balwant Mahajan;

(ii) that it had not been proved that the testator was in a sound disposing state of mind at the time of the alleged execution.

(iii) that it was not proved that the testator had been made aware of the contents or that he had given his approval thereto and

(iv) that the respondent Sakharam was related to the late testator and was his gotraja sapinda.

On these findings the application was dismissed.

It will help to clarify the position if we give a short resume of events which occurred during the last six months of the testator's life. He took ill at Nagpur in February or March 1924. First of all, malaria was suspected and subsequently tuberculosis: cf. the evidence of Dr. Khare (P. W. 3) who was attending the testator. On his advice, Vithal Balwant Mahajan was removed to Bombay, partly in order that he might get the advice of specialists and partly in order to avoid the heat of Nagpur. Meanwhile, the respondent Sakharam had also left for the Konkan in the Bombay Presidency. The testator and the appellant left Nagpur for Bombay in June 1924. In Bombay, the medical opinion was that the disease from which the testator was suffering was not tuberculosis. On the 10th of July 1924 he left Bombay for Umarkhed (Yeotmal) where he went to reside with Raghunath

Bhaskar Kelkar (P. W. 5), Assistant Medical Officer, who was then stationed there. The relationship of this man to the family will be seen from the genealogical tree contained in annexure A.*

On the 18th of August 1924, the appellant with his mother left Nagpur for Umarkhed. On the 7th September 1924, Bhaskar Rao Kelkar (P. W. 9) also arrived at Umarkhed. On the following day, this witness prepared a draft of the will (Ex. P. 76), and on the 14th of the same month the witness left Umarkhed. On the 16th of September, at 8 a. m., the testator is alleged to have executed the will, which on the same day later on he handed over to his mother. At 2 or 2-30 p. m. the appellant is said to have informed Raghunath Bhaskar Kelkar (P. W. 5) of the execution of the will and this witness is said to have verified the fact from the dying man. In the evening the appellant is also alleged to have told Trimbak Rajurkar (P. W. 2), a clerk to the District Registrar at Yeotmal, who was then officiating as Sub-Registrar, Umarkhed, of the execution of the will, and both on the 16th of September 1924 and the following day the witness is said to have asked the testator to have the will registered, but he declined to have this done. The same evening the testator became delirious and died the following day. On the 19th September 1924, the appellant left Umarkhed for Nagpur and en route there met Mr. Gadgil, Pleader, on his way to Umarkhed to see the deceased man, and the appellant informed him of the execution of the will. Mr. Gadgil thereupon desisted from his intention of going to Umarkhed and returned to Nagpur with the appellant.

The learned Additional District Judge has devoted considerable attention to the question of the authenticity or otherwise of the testator's signature on the will in suit. In that connexion we have absolutely divergent evidence from the handwriting experts, Shah (P. W. 6) and Brewster (D. W. 11) who have been examined on either side. Counsel on either side has laid no stress on this expert evidence, it being apparently taken that the two experts equally balanced one another.

*The genealogical tree is not material for this report.

For our own part, after examining the signature and keeping in mind the extremely parlous and prostrate state in which the dying man was, we think there is considerable ground for preferring the evidence of Brewster (D. W. 11). If, as is said to be the case, the man was only able to turn over on his side and make his signature when prone, one should have expected to find a much greater difference than in reality exists between the signature on the will and other admitted signatures of Vithal Balwant Mahajan.

There are, however, many other highly suspicious points in the present appellant's case. It is impossible to avoid the conclusion that the idea of having a will executed did not emanate from the boy himself. This idea was obviously hatched at Nagpur. The appellant (cf. the evidence of Mr. Gadgil, P. W. 7, page 85 of the record), had had a talk with the witness about the advisability of getting the deceased to execute a will. Mr. Gadgil seems even to have gone into details and suggested a form of preamble as well as the appointment of an executor. Both these suggestions are embodied in the will in suit. Apparently, the appellant found it difficult to make the suggestion to the testator and Bhaskar Rao Kelkar (P. W. 9) alias Aba, the elder brother of the testator's mother, was then brought on the scene. He candidly admits having prepared the draft of the will (Ex. P. 76) and says he prepared the draft on the lines of one made by the late Balwantrao Mahajan. It is highly significant that the draft of the will was apparently prepared as a result of consultation between Mr. Gadgil and appellant on the one hand and the appellant and this witness (P. W. 9) on the other, and it is further curious that the will was apparently not even read over to the dying man who was certainly not in a condition to read it for himself. Another curious circumstance is that one Bangaji, who had accompanied P. W. 9 to Umarkhed and had been present at some of the occurrences on the 8th and 9th September has not been examined at all in the case.

The appellant's further story is that at 8 a. m. on the 16th of September the dying man called him and asked him to scribe the will. The appellant did so

and, according to his story, Vithal Balwant Mahajan executed it when no one else was present. The appellant tells what seems to us to be an utterly incredible story in this connexion. With regard to the lack of any attesting witnesses, the appellant asks us to believe that he suggested to Vithal Balwant that it would be desirable to have the will attested but the latter replied both as regards attestation and registration that it was unnecessary at the time to have these formalities carried through. The failure to have the will at least attested, if not registered, is the more extraordinary in that in a place like Umarkhed there must have been numerous reputable people available whose services could have been used in this connexion, for example, Trimbak Rajurkar (P. W. 2), Sub-Registrar, was a close neighbour. Another curious and suspicious fact is that the will was not handed over to the executor but to the mother of the testator, an illiterate woman.

We have already pointed out that the appellant on his way back to Nagpur met Mr. Gadgil en route for Umarkhed and informed him of the testator's death and of the fact of the execution of the will. Meanwhile, after his return to Nagpur, the appellant met Narayanrao Kelkar (P. W. 1), a relation of the family. This gentleman we can see no reason whatever for discrediting and, if his evidence be true, it is difficult, on any reasonable hypothesis, to suppose that the will in question is a genuine one. Mr. Kelkar had always taken a keen interest in Vithal Balwant and it was his intention to have gone and seen him on the 29th of September 1924. He received intimation of the death in a wire sent from Basim on the 23rd of September 1924 by Babu Datar, the appellant. It is noticeable that this wire was only sent five days after death had occurred. Meanwhile Mr. Kelkar (P. W. 1) had come to Nagpur on the 20th of September and met Mr. Gadgil (P. W. 7) on the 21st idem, as well as the appellant. Extraordinarily enough, the appellant did not tell Mr. Kelkar that Vithal Balwant Mahajan was dead; on the contrary he seems to have devoted his attention to dissuading Mr. Kelkar from attempting the journey to Umarkhed by informing him that there was cholera at Basim and that the road was very bad,

these reasons also being adduced for Mr. Gadgil's return without having completed the journey to Umarkhed. Later in the day, Mr. Kelkar went to see Mr. Gadgil and asked him if he had advised the testator to make a will. Mr. Gadgil did not explicitly inform Kelkar that the will had been executed, but merely threw out the suggestion that something of the sort had been done, but curiously enough both men suppressed from Mr. Kelkar the fact that Vithal Balwant was already dead.

A more suspicious attitude on the part of those who had undoubtedly been anxious to get the dying man execute a will cannot be imagined. There seems every ground, in short, for supposing that, although a draft of the will had undoubtedly been prepared, the dying man was not prepared to sign it, and everything points to the fact that he was anxious, before doing so, to see Mr. Kelkar (P. W. 1), while the appellant and his coterie were equally anxious by any means, fair or foul, and by deliberate prevarication and lying to prevent Mr. Kelkar from visiting the sick man at Umarkhed.

We are, in short, in full agreement with the considerations adduced by the Additional District Judge in this connexion. We are of opinion, in the first place, that the signature on the will is far too deliberate and too well made to have been made by the deceased in the state he was admittedly in at the time of the alleged execution. The extraordinary conditions of secrecy, under which the will was executed, are also in the highest degree suspicious. On no reasonable theory is it possible to account for the absence of witnesses at the time of execution, for the non-attestation of the will and for its non-registration except on the single theory that the alleged signature of the testator is a sheer forgery. We do not find it necessary to go in detail in the matter of the internal evidence of the will, for the will is precisely of the nature which the appellant and his coterie would have been anxious to bring into being in their own interests.

In a case like the present where the party writes a will under which he has to take very great benefits, that circumstance of itself must put a Court on guard and cause it to be vigilant in exam-

ining the evidence in support of the instrument. When this test is applied to the present case all circumstances surrounding the preparation of the draft of the will, the scribing of the will by the appellant, the alleged signing of the will by the testator, and lastly but not least the extraordinarily secret attitude which the appellant and his partisans took up with regard to the execution of the will, and even as to the fact of the testator being still alive or dead, are replete with suspicion, and the case, in short is one in which we cannot find the slightest reason for disturbing the undoubtedly sound findings of fact which the lower Court has arrived at in this connexion.

As far as the question of Vithal Balwant Mahajan having been in a disposing state of mind at the time of the alleged execution of the will is concerned, there is evidence on record that he was undergoing intense suffering, but such a state does not necessarily mean that he had lost his powers of intelligence or of consciousness. We do not, however, deem it necessary to record any definite finding as to whether the deceased was at the time of the alleged execution of the will in a disposing state of mind or not for the simple reason that we are convinced that he never did execute this will himself.

These findings govern the appeal which is accordingly dismissed. The appellant must bear the respondent's costs. Costs in the lower Court as already ordered. We fix Rs. 200 as pleader's fees.

G.B.

Appeal dismissed.

A. I. R. 1927 Nagpur 267

FINDLAY, J. C.

Mt. Sarji Bai—Defendant—Appellant.

v.

Durga and others—Plaintiffs—Respondents.

Second Appeal No. 117 of 1926, Decided on 24th March 1927, from the judgment of the Addl. Dist J., Nagpur, D/-12th December 1925, in Civil Appeal No. 69 of 1925.

(a) *C. P. Land Revenue Act (1917), Ss. 188 and 192—Remuneration of mukaddam gumashta and havildar—Co-sharers are not bound to share unless they have agreed and their services are necessary.*

There is no authority for the view that when a lambardar chooses to engage a havildar or mukaddam gumashta he is entitled to saddle the co-sharers with a share of his wages. At any rate, before he can be entitled to charge the co-sharers with such expenses, it must be proved that their entertainment was absolutely essential for the collection of the rent and land revenue, and the co-sharers agreed thereto. [P 268 C 2]

The Legislature intended the lambardari haq to cover expenses like these.

(b) *C. P. Land Revenue Act, (1917), Ss. 188 and 192—Expenses of public festivals—Co-sharers are not bound to share unless they have agreed to—Payment in past does not constitute implied agreement.*

Before the co-sharers can be made liable for money which the lambardar spends on celebration of public festivals, distinct proof of a prior agreement to share these expenses on the part of the other co-sharers would be necessary. Such items cannot be regarded as essential expenses for village management. The mere fact that they were shared in the past is not sufficient to assume that there was an implied agreement to pay. [P 269 C 1]

M. R. Bobde and M. D. Khandekar—for Appellant.

S. K. Barlinge—for Respondents.

Judgment.—The facts of this case are sufficiently clear from the lower Courts' judgments. The defendant *Mt. Sarjabai*, who is the lambardar of the village concerned, has come up on appeal against the judgment and decree of the Additional District Judge, Nagpur, which disallowed her claim to recover Rs. 61 on account of wages of the havildar and the mukaddam gumashta, as well as a petty charge of Re. 1 for stationery. Another item is also involved, petty in itself, the amount being Rs. 4-8-0 which was claimed in connexion with expenses incurred for the Holi and Dasehra celebrations.

On behalf of the appellant, reference has been made to paragraph 6 of her written statement, dated 4-1-24. She therein claimed Rs. 18 being half of the yearly remuneration of Rs. 36 paid to the mukaddam gumashta. Similarly, Rs. 42 being half of the yearly remuneration paid to the same man as havildar was claimed. Admittedly, a single man performs both those duties, his total monthly remuneration thus being Rs. 10. It is urged that the lower appellate Court, in disallowing these items, wrongly went into the question

whether the entertaining of this man as havildar and mukaddam-gumashta was necessary. It seems to me that this question clearly and impliedly arose on the pleadings. In paragraphs 7 and 8 of the plaintiff's rejoinder, dated 9-1-25, it was pleaded, apparently in the alternative, that, as the defendant received lambardari haq, she could not recover the mukaddam-gumashta's pay; while, as regards the havildar, it was pleaded that he was the defendant's private servant who did other work, with which we are not concerned, and who received no separate pay in respect of such work. It seems to me that, in the circumstances of this case, Issue 4 sufficiently covered the very simple point at issue and that the Judge of the lower appellate Court was perfectly entitled to consider the incidental matter whether or not it was necessary to entertain a separate havildar for the purposes of village management as concerning all the shareholders. The evidence of Ghulba (D. W. 5) sufficiently establishes the fact that his duties are multifarious and include various items for which the plaintiff-respondents cannot, on any reasonable basis, be held responsible.

Reliance has been placed by the appellant on the decision of Stevens, J. C., in *Tatya Patel v. Dhundiraj Patel* (1). In that decision, the learned J. C. held that under S. 139, C. P. Land Revenue Act of 1881 the remuneration therein allowed only relates to the performance of the statutory duties imposed on the lambardar under S. 138 *idem*. In the new Land Revenue Act of 1917 the corresponding sections to Ss. 138 and 139 of 1881 are 188 and 192 respectively. The provision contained in the latter section definitely provides that the Deputy Commissioner must fix the remuneration of the lambardar-gumashta and mukaddam and contains a proviso that the normal and aggregate sum so payable by each proprietor shall not exceed 5 per cent of the land revenue assessed on his land. It is, moreover, noticeable that under S. 190, sub-S. (4), if the mukaddam fails to appoint a mukaddam-gumashta, the Revenue Officer may himself appoint such agent and fix the remuneration payable to him by the mukaddam.

For my own part, I find myself in full agreement with the decision of Drake-Brockman, J. C., in Second Appeal No. 490 of 1924, decided on 19-6-1915. The havildar and mukaddam-gumashta in this instance cannot be said to be a servant of the proprietary body. He is a private servant of the lambardar and appears to spend most of his time in looking after affairs with which she is only concerned as regards her own share in the village. The very reason for the statutory enactment contained in the new Act with reference to the remuneration to be paid to the lambardar was, in my opinion, to obviate the troublesome questions which may arise in cases of this nature where there was not a definite statutory provision on the point.

In the present instance, it is alleged that the lambardar's pay is only Rs 17 and that this does not suffice to cover the expenses involved. If this be so, the remedy of the appellant is to apply to have special remuneration fixed above the 5 per cent. limit in accordance with the first proviso to S. 192 of the Land Revenue Act. I know of no authority for the view that when a lambardar like the present chooses to engage a havildar, she is entitled to saddle the co-sharers with a share of his wages. At any rate, before she could do so, she would have to prove that his entertainment was absolutely essential for the collection of the rent and land revenue, and the co-sharers agreed thereto. The evidence on record appears to be precisely the reverse as regards Ghulba (D. W. 5).

It has also been suggested on the authority of the receipts (Exs. D. 11 and D. 12) that in the past the second plaintiff-respondent and his father used to contribute their quatum towards the pay of the mukaddam gumashta and the Holi and Dasehra expenses. These receipts seem to me far a slender basis on which to construct the theory of an implied agreement which would be now binding on the present respondents. The payments may have been made *ex gratia* in the past and, in any event, even if for the eight years preceding 1922, Baliram and his father had made these payments, I am unable to see any ground for holding that the present plaintiff-respondents are bound by their action.

In the present case there has been obviously no sufficient proof that th.

services of an all-time man were necessary for the purpose, either as havildar or as mukaddam gumashta, of the performance of duties, for which the co-sharers are bound to pay a share of his remuneration and, in my opinion, there is valid ground for supposing that the Legislature intended the lambardari haq to cover precisely expenses like these which are claimed. If such out-of-pocket expenses like those mentioned as well as the price of stationery, were to be allowed, it is obvious that the lambardari haq would in many cases amount to a grossly excessive figure. The co-sharers have had no control over Ghulba (D. W. 5), and I know of no sound basis for the contention that the present plaintiff-respondents are liable to contribute towards his pay. I find myself in full agreement with the lower appellate Court in its finding that the lambardari haq covers items like those comprising a total of Rs. 61 claimed by the defendant-appellant in this connexion.

As regards the Holi and Dasehra expenses, I have already disposed of the contention that the receipts alluded to above formed a sufficient basis for assuming that there was an implied agreement to pay a proportion of these expenses. It has been suggested on behalf of the appellant that as they have been paid in the past, notice was necessary before the plaintiffs could repudiate their liability to contribute to items like these. For my own part, I know of no authority for the view that these items can be regarded as essential expenses for village management. That public celebrations of these festivals do occur in villages where Hindus predominate, or are even in a minority, is undoubtedly true, but, before the co-sharers could be made liable for money which the lambardar spends on such celebrations, distinct proof of a prior agreement to share these expenses on the part of the other co-sharers would be necessary. I know of no legitimate ground on which these expenses could be allowed and I find myself in full agreement with the Judges of both the lower Courts on this point. As remarked by the Subordinate Judge, the village wajib-ul-arz contains no entry regarding such items.

These findings govern the appeal which is dismissed. The appellant must bear

the respondents' costs. Costs in the lower Courts as already ordered.

G.B.

Appeal dismissed.

*** A. I. R. 1927 Nagpur 269**

HALLIFAX, A. J. C.

Kamod Singh—Appellant.

v.

Rhemkaran—Respondent.

Second Appeal No. 266 of 1926, Decided on 30th April 1927, from the decree of the Dist. J., Chhindwara, D/- 30th January 1926, in Civil Appeal No. 82 of 1925.

** (a) Civil P. C., O. 13, Rr. 1 and 2—All relevant evidence should be admitted at any stage of proceedings, giving due weight to circumstances under which it is produced—Evidence.*

A document which was relied on was mentioned in the plaint. The document was lost and the fact that it was lost was mentioned in an oral pleading made while evidence was being given and leave was asked to prove it by secondary evidence. This was refused on the ground that no plea of loss of document was raised in the earliest stage. The document was found subsequently and was tendered in the lower appellate Court, and that Court was of opinion that the refusal to admit secondary evidence was correct because no plea about the loss of the original document was made and he refused to accept the document itself for the same reason. [P. 270 C 2]

Held: it is the duty of a Court to get hold of all the relevant evidence there may be and to examine it, giving of course due weight to any circumstances attending its production that might render it less or more credible, and giving the other party a fair opportunity of meeting it, and no Court has the right to reject evidence tendered at any stage of the trial before its close unless it is irrelevant. [P. 270 C 2]

(b) Evidence Act, S. 65—Omission to plead loss of a document at the earliest stage of proceedings is not a ground for rejecting its secondary evidence.

Where a document was mentioned in the plaint, and the fact that it had been lost was mentioned in an oral pleading made while evidence was being given, when leave was asked to prove it by secondary evidence

Held: that the fact that the loss was not pleaded in the earliest stages of the case could not justify the rejection of the plea, particularly as the document was specifically mentioned in the plaint with its date. [P. 270 C 2]

(c) Landlord and Tenant—A person can be tenant of a body of which he is one.

It is not only possible but very common for one person to be a tenant of a body of persons of whom he himself happens to be one; the tenant is the individual and the landlord is the corporate body. [P. 271 C 1]

*B. K. Bose, V. Bose and P. N. Rudra—*for Appellant.

*P. C. Dutt—*for Respondent.

Judgment.—The parties to the suit are equal cosharers in the village of Bhalewara and the dispute between them relates to three parcels of land at present recorded as the separately held khudkasht of the plaintiff-respondent Khemkaran. In proceedings for a partition of the village by a Revenue Officer it was found that this land was khudkasht held in severalty and part of the total area of which each party was to get half, and Khemkaran's application to have it allotted to his patti and excluded from the total area of khudkasht for equal division was rejected. His plea from the very beginning was that he was an occupancy tenant of this land, but the learned District Judge seems to have added more misunderstanding of this position to that of the Revenue Officer, though it was lucidly explained by the Commissioner in the appeal from the Revenue Officer's order.

The Revenue Officer's order was passed on the 26th of April 1924 and was to the effect that Khemkaran was not the separate owner of the land in dispute, which he never said he was. The order is one passed under Cl. (c), S. 169 (1) Land Revenue Act, but the learned District Judge calls it an order confirming the partition. No such order has even yet been passed, nor can one be passed till this suit has been finally decided. The suit was filed on the last possible day of the period of limitation, the 30th of October 1924, advantage being taken even of the fact that on the 26th and the three following days the Courts were closed. There is no claim of separate proprietorship in the plaint. The history of the fields is given, according to which the plaintiff would be entitled to hold them as an occupancy tenant and the reliefs claimed are cancellation of the order passed in April 1924 by the Revenue Officer and a declaration that the defendant is not entitled to hold possession of the land in question.

The land claimed by the plaintiff is in three parcels. In respect of the first two it is held that the plaintiff inherited tenancy rights in them, but those rights merged in the proprietary right when he became a cosharer in the village and they were recorded as khudkasht. It is, however, further held that land so inherited becomes the separate property

of the person who inherits it. The first proposition is equivalent to saying that a person who is tenant of a whole field loses his tenancy rights in half of it when he becomes the owner of the other half. The second contradicts it by saying that he becomes proprietor of one and was a tenant of the other. Both are obviously incorrect.

In respect of the third parcel it was pleaded that the tenancy right in it was acquired by the plaintiff's predecessor-in-title under a rajinama of 1897. This document was mentioned in the plaint, and the fact that it had been lost was mentioned in an oral pleading made while evidence was being given, when leave was asked to prove it by secondary evidence. This was refused on the ground that the loss was not "specially pleaded" which probably means that it was not pleaded in the earliest stages of the case, though, even so it could not justify the rejection of the plea, particularly as the document was specifically mentioned in the plaint with its date. It was apparently found later and was tendered in evidence in the lower appellate Court. The learned District Judge was of opinion that the refusal to admit secondary evidence was correct because "no plea about the loss of the original rajinama was made," which is incorrect, and he refused to accept the document itself "for the same reason" which would be no reason even if it were correct.

It is the duty of a Court to get hold of all the relevant evidence there may be and to examine it, giving of course due weight to any circumstances attending its production that might render it less or more credible, and giving the other party a fair opportunity of meeting it, and no Court has the right to reject evidence tendered at any stage of the trial before its close unless it is irrelevant. The document has again been tendered in this Court, and the appellant has now admitted that it ought to be accepted in evidence, and, further, that it is genuine and the statements in it are correct. That itself is a sufficient commentary on the refusal of the Courts below even to look at it.

In discussing the facts relating to the three parcels of land the following genealogy will make things clearer :

Hiralal=Budhia. Dhiraj
 |
 (1) Sumitri=Bhola=(2) Bela
 |
 Khemkaran, P.

The plaintiff's half-share in the village belonged originally, so far as we are concerned, to Hiralal, who died at some time in the last century. On his death, for some reason, his widow Budhia was recorded as the owner of the share and also as lambardar, and she remained so recorded till her death in 1921, though Hiralal's son Bhola lived till 1906 or 1907, when his son Khemkaran, the plaintiff, was five or six years old. When she died Khemkaran's name was recorded as owner of the share in place of hers.

In examining the facts a very simple conception has to be borne in mind, which seems to have been much misunderstood in this case, as it often is. That is that it is not only possible but very common for one person to be a tenant of a body of persons of whom he himself happens to be one; the tenant is the individual and the landlord is the corporate body.

The first of the three parcels of land was the tenancy holding of Dhiraj the father of the plaintiff's step-mother Bela. After his death Bela held it till her death in 1901. After that it was recorded as the tenancy of her husband Bhola, and, on his death in 1906, as that of his son, the plaintiff Khemkaran. In 1909-10 the land was recorded as the khudkasht of Budhia, with whom Khemkaran, then about nine years of age, was living. It continued so till she died in 1921 and thereafter was shown as Khemkaran's khudkasht. A good deal has been said about the right of Bhola to inherit the tenancy from his wife, but we are not concerned with that. All that matters is that Bhola did become the tenant of the land in 1901-1902 and his son Khemkaran became tenant in his place in 1907-08. Now Khemkaran could not lose his tenancy rights only because the patwari could not grasp the simple idea that he could be the tenant of the proprietary body consisting of the defendant's predecessor and his own grandmother or even himself, or the perhaps simpler idea that his grandmother might hold possession of the field on his behalf, not on her own.

Khemkaran himself, with everybody

else, seems to have fallen into the same mistake in allowing the field to remain recorded as khudkasht, probably because it would make no difference till there was a partition of the village. But the record is merely a record of the fact that Budhia was in possession of the land and Khemkaran after her, and she can only be regarded as in possession on behalf of the tenant, her minor grand-son, and he as in possession as tenant.

As regards the second parcel of land, with an area of 5.40 acres, the learned Judge has misread the evidence. It consists of two fields now bearing the numbers 120 and 130, which were 119 and 141 till the Settlement of 1919. One Chatru, who was of the same caste as the plaintiff but has been shown to have been related to him, was the tenant of this land till his death in 1910. It was thereafter recorded as Bela's khudkasht. The plaintiff's case was that he either inherited this holding from Chatru or became tenant of it by survivorship on Chatru's death, having been a co-tenant with him. It is said in the judgment of the lower appellate Court, in respect of this parcel of land, that

field old No. 119, . . . has been shown to be first of all recorded as the tenancy land of Chatru, Basanta and Bhola, as appears from the jamabandis, Exs. P. 9 and P. 10 and so that

there is oral evidence to show that Chatru was related to Bhola.

There is in fact no such evidence at all. The jamabandi entries mentioned do not refer to No. 141 at all, and the name of Chatru alone appears in each of them. The land, therefore, as is now admitted for the respondent, lapsed to the proprietary body on Chatru's death and was thereafter held in severalty by Budhia, so that it is now liable to partition.

The third parcel of land, in respect of which the plaintiff has filed a cross-objection, is one field of 7.26 acres, which was part of an occupancy holding of 25 acres bought by Budhia for Rs. 74 in 1897. She obviously became the occupancy tenant of the proprietary body in respect of that land, although it was recorded by mistake as her khudkasht, and Khemkaran, who succeeded her as tenant, cannot now be ousted from it. The defendant suggested that he was entitled to joint possession with the plaintiff on payment of the proportionate

share of the cost of acquisition. That cannot be claimed as of right, because the acquisition was not on behalf of the proprietary body and the plaintiff declined the tempting offer of Rs. 11 for half the field as a compromise.

The decree of the lower appellate Court will accordingly be set aside and in its place a decree will issue declaring that the fields described above as the first parcel and the third parcel are the plaintiff's occupancy holdings and are not liable to be divided in a partition of the village except as occupancy holdings. The result is that the plaintiff has succeeded in respect of 69.27 acres and failed in respect of 5.40 acres. He will therefore pay one-thirteenth of the total costs of both parties in all three Courts, and the defendant will pay the remaining twelve-thirteenths. The pleader's fee in this Court, in respect of both, the appeal and the cross-objection, will be two hundred rupees.

G.B.

*Appeal allowed.***A. I. R. 1927 Nagpur 272**

HALLIFAX, A. J. C.

Dulru—Plaintiff—Appellant.

v.

Shiolal—Defendant—Respondent.

Second Appeal No. 207 of 1926, Decided on 22nd February 1927.

(a) *C. P. Tenancy Act, (1920), Ss. 11 and 5—Difference in wording is merely curiosity in drafting.*

The omission to mention survivorship in the case of an occupancy holding in S. 11 seems to have no more meaning or effect than the omission to state that the interest in that section is the interest in the holding, and the difference in the wording of the two sections seems to be merely a curiosity in drafting. [P 272 C 2]

(b) *Hindu Law—Succession—Son joint at death of father succeeds to the exclusion of separated son.*

A son joint with the father at his death succeeds to the occupancy holding to the exclusion of the son who had separated from him: 13 C. P. L. R. 137, *Foll.* [P 272 C 2]

*W. R. Puranik—for Appellant.**D. T. Mangalmurti—for Respondent.*

Judgment.—The joint Hindu family consisting of the plaintiff Dulru Teli, his step brother Shiolal, the defendant, their father Sukhdeo were the absolute occupancy tenants of 15.11 acres and occupancy tenants of 7.51. In 1915 Dulru separated from the other two who remained joint. The figures given

in the jamabandi entries vary slightly from year to year in respect of fractions of an acre, but roughly it may be said that Dulru was given $4\frac{1}{2}$ acres of absolute occupancy and $2\frac{1}{2}$ acres of occupancy land. On Sukhdeo's death, in 1924, Dulru claimed a half-share in all the 22.62 acres, on the untrue averment that he had never separated from the joint family, but was given a part of the land to hold separately only for convenience in management.

His appeal against the dismissal of his suit has been abandoned except for one point which is not mentioned in the petition of appeal. It is now urged that he is entitled to get a half of his father's occupancy holding of five acres by inheritance. This contention is based on the difference between Ss. 5 and 11 of the Tenancy Act, 1920. The former section is as follows:

The interest of an absolute occupancy tenant in his holding shall, on his death, pass by inheritance or survivorship in accordance with his personal law.

The first part of S. 11, with which alone we are concerned, is exactly the same except for the omission of the words "absolute in his holding" and "or survivorship."

The omission to mention survivorship in the case of an occupancy holding seems to have no more meaning or effect than the omission to state that the interest is the interest in the holding, and the difference seems to be merely a curiosity in drafting. But even if the occupancy holding were the separate property of Sukhdeo, and it had to pass by inheritance only, as distinct from survivorship, it would still pass wholly to the son, who was joint with him at his death, to the exclusion of the son who had separated from him. The texts from the Mitakshara quoted in *Chudaman Singh v. Sakharam* (1), put that beyond doubt.

The appeal will be dismissed and the plaintiff-appellant will pay the whole of the costs of both parties in all three Courts. The pleader's fee of Rs. 6-3-3, allowed by each of the learned Judges of the Courts below, is obviously inadequate in addition to being grotesque. The pleader's fee in this Court will be forty rupees.

D.D.

Appeal dismissed.

(1) [1900] 13 C. P. L. R. 137.

A. I. R. 1927 Nagpur 273

FINDLAY, J. C., AND MACNAIR, A. J. C.

Ramlal—Defendant—Appellant.

v.

R.B. Indrajraj Singh—Plaintiff—Respondent.

First Appeal No. 71 of 1925, Decided on 1st April 1927, from the judgment of the Addl. Dist. J., Bhandara, D/- 16th June 1925, in Civil Suit No. 6 of 1924.

(a) *Hindu Law — Gift to daughter—No presumption of grant of only life estate arises.*

The presumption which applies in the case of a Hindu husband's gift to his widow, that only a life estate is acquired, does not necessarily *proprio vigore* apply in the case of gift to a daughter: 9 C. P. L. R. 95; 32 Cal. 1051; A. I. R. 1923 Mad. 207 and 16 Mad. 465 (P. C.), *Rel. on.* [P 274 C 1]

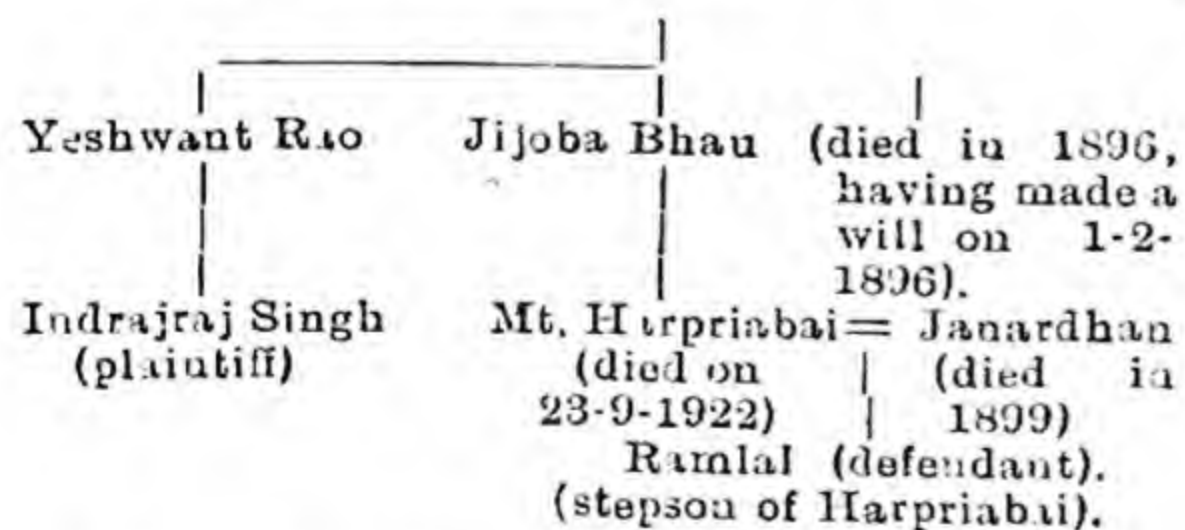
(b) *Hindu Law—Maintenance grant—Use of "for ever" and "in proprietary rights"—Effect.*

The words "for ever" and "in proprietary rights" would not necessarily enlarge the scope of a maintenance grant: 23 All. 194 (P. C.); 23 All. 324 (P. C.) and 25 Bom. 563, *Rel. on.* [P 274 C1]

B. K. Bose—for Appellant.

V. Abhyankar—for Respondent.

Judgment.—The relationship of the parties to this case will be clear from the following genealogical tree.



The plaintiff is the zamindar of Kamtha, Wadad and Deori Kishori talukas. Harpriabai had no issue, while the defendant Ramlal is her stepson. The plaintiff's case was that mouza Ekodi was given to Harpriabai as a maintenance grant for life by his father Yeshwant Rao and his uncle Jijoba Bhau,

who were then joint, some five years after her marriage which took place some 60 years before the date of the suit. After Harpriabai's death, the village reverted to the plaintiff, but as the defendant continued to hold wrongful possession of it, the present suit was brought.

The defendant's position was that Yeshwant Rao and Jijoba Bhau had gifted mouza Ekodi absolutely by an oral grant to Harpriabai. The grant was said to have been in the nature of a bridal gift given at the time of her marriage, but, even if given after the marriage, it was alleged to have been an absolute grant and not one for maintenance only. The defendant Ramlal was, therefore, entitled to the village as the personal heir of Janardhan and Harpriabai. It was further pleaded that, in any event, Harpriabai and Ramlal have been in adverse possession for more than 12 years.

On the issues which arose on these and other incidental pleadings in the case, the Additional District Judge came to the following findings:

(a) That mouza Ekodi was given to Mt. Harpriabai only for maintenance during her life some time after the 30 years Settlement;

(b) that the decision of the Subordinate Judge, Bhandara, in Civil Suit No. 141 of 1919, did not operate as res judicata on the question of the grant concerned having been a maintenance one;

(c) that mauza Ekodi was not gifted to Harpriabai and Janardhan, as alleged by the defendant; and

(d) that no question of adverse possession during Harpriabai's lifetime arose and that, therefore, the plaintiff was entitled to possession.

Decree was passed accordingly in favour of the plaintiff, and the defendant has now come up on appeal to this Court.

In the present appeal we are concerned only with the question whether the grant in question was one for maintenance or was an absolute gift. The position, thus, is that, if the grant was merely a maintenance one, the village necessarily reverted to the plaintiff; if, on

the other hand, there had been an absolute gift of mouza Ekodi, the defendant is undoubtedly entitled to retain possession. The case for the defendant-appellant is that the grant in question was made on or about the time of Harpriabai's marriage, who was then only a child. The two brothers, Yeshwant Rao and Jijoba Bhau, had admittedly much valuable estate and the gift, in effect, was, from their point of view, an inconsiderable one. It has been suggested in this connexion that, in those circumstances, in the absence of anything to the contrary, a presumption arises that the gift was an absolute one and it has been quite correctly pointed out that the presumption, which applies in the case of a Hindu husband's gift to his widow, that only a life estate is acquired, does not necessarily proprio vigore apply in the case of a gift to a daughter: cf. *Daxlat Mali v. Nand Lal* (1); *Atul Krishna Sircar v. Sanyasi Churn Sircar* (2); *Kanakammal v. C. Baktavatsulu Naidu* (3) and *Ramasami v. Papayya* (4).

In this state of the law, it has been urged on behalf of the appellant that the evidence of his witnesses Chindhu (D. W. 4) Laxi (D.W. 5) and Brijlal (D.W. 10) should have been accepted as establishing the theory that the gift in question was an absolute one. We have examined this evidence, but we do not think that the statements of these three witnesses are by any manner or means so cogent or so convincing as to establish the proposition in question. Chindhu (D. W. 4) was aged 70 when he was examined. According to him, the grant was made at the time of the marriage and no conditions were imposed, D. W. 4 Laxi's evidence is slightly different. He described the grant or gift as having been made for maintenance and in perpetuity. As was rightly pointed out by the Judge of the lower Court, the words "for ever" and "in proprietary right" would not necessarily enlarge the scope of a maintenance grant: cf. *Rameshar Bakhsh Singh v. Arjun Singh* (5); *Aziz-*

un-Nissa v. Tasaddug Husain Khan (6) and *Karim Nensey v. G.K. Heinrichs* (7).

As regards Brijlal (P. W. 10): we do not regard his evidence as satisfactory. He appears to have attempted to post-date the time of the marriage so as to make it appear probable that he would be of sufficient age to remember details of what occurred then. His present version is that the marriage occurred at the time of the 30 years' Settlement, viz., in 1865-66, but in another case he had given evidence on oath to the effect that the marriage took place 6 or 7 years before that Settlement. We do not think the oral evidence of these three witnesses could, with any safety, be relied upon as establishing the nature of the grant or gift in question. On neither side is the oral evidence of a convincing nature, but in this connexion the evidence of these three witnesses does not, in our opinion, establish the nature of the disposition of mouza Ekodi made in favour of Mt. Harpriabai.

Much stress has, however, been laid on behalf of the appellant on the terms of the will (Ex. D. 9) admittedly made by Jijoba Bhau at a time when he was ill and in expectation of death. That will is undoubtedly of importance. In its preamble the testator mentions that he wishes to make a disposition of the property with a view to prevent quarrels and disputes in future. In para. 1 thereof he states that he makes the following arrangement for the maintenance of his wife Nekibai, of his second wife Girjai, of his widowed daughter-in-law Gangabai, of his married daughter Harpriabai and of two other daughters Kolhabai and Bhulabai. In the case of Nekibai and Girjai, the will contains an express provision that the property left to them was left only for their maintenance during their lifetime. The solitary exception was in the case of ornaments which in each instance were distinctly stated as becoming the legatee's absolute private property. A similar provision was made for maintenance in respect of the other legatees with the exception of Harpriabai. In Cl. (4) of the will the following passage occurs:

Harpriabai has already been given at the time of her marriage mouza Ekodi with the consent

(1) [1896] 9 C. P. L. R. 95.

(2) [1905] 32 Cal. 1051=2 C. L. J. 50=9 C. W. N. 784.

(3) A. I. R. 1923 Mad. 206.

(4) [1893] 16 Mad. 476=3 M. L. J. 205.

(5) [1901] 23 All. 194=28 I. A. 1=7 Sar. 804 (P. C.).

(6) [1901] 23 All. 324=28 I. A. 65=3 Sar. 54 (P. C.).

(7) [1901] 25 B. n. 563=28 I. A. 193=3 Sar. 79 (P. C.).

of the late Yeshwant Rao Bhao Saheb zamindar and myself. It may continue accordingly.

It has been urged on behalf of the appellant that the terms in Cl. (4) of the will place no limit on the nature of Harpriabai's property in mouza Ekodi and it has been urged that the expression used indicates absolute estate. We are wholly unable to accept this contention. It must be remembered in the first instance that, as regards the remaining legatees, it was essential for the testator to make express and specific provision for their maintenance. In the case of Harpriabai, as Cl. (4) of the will shows, arrangements, whether for maintenance or for absolute estate, had already been made and the reference to Harpriabai is only an incidental one. In this aspect of the case, it would be unsafe, in our opinion, to lay undue weight on the expressions used with reference to her unless these expressions distinctly connoted either absolute estate of a mere maintenance grant. Regarded by themselves the terms of Cl. (4) of the will are colourless in this respect, but if we take into account the context and indeed the whole contents of the will, the expression used seems to us to have reference to the fact that the testator had already arranged for the maintenance of Harpriabai rather than to be a deliberate statement that he had already given her an absolute estate in mouza Ekodi. This is clear from the fact that in Cl. (1)—the introductory one of the will—the testator expressly states that he intends making a provision for the maintenance of the ladies, and among the ladies mentioned, Harpriabai's name occurs. In this connexion a passage in para. (5) of the penultimate clause of the will is also suggestive. Therein the testator says:

I have, therefore, made this arrangement in respect of those who are entitled to the right of maintenance from my property.

Apart from this, although no question of absolute custom arises, it seems to have been the practice in this zamindari, as evidenced by the provisions made for the daughters Kolhabai and Bhulabai, to give the profits of a village for the maintenance of unmarried daughters until their marriage and then to allow them a fixed sum or the profits of a village approximating to the sum mentioned. We, in these circumstances, find it unlikely that, so far back as the sixties,

Jijoba and Yeshwant Rao would have made an out-and-out gift of the village in question to Harpriabai. Both Yeshwant Rao and Jijoba were at that time young men and could well have entertained hopes of having more issues. It is no doubt true that they were rich people, but the fact remains that if the theory of the gift were to be accepted, it was in the case of this child or female relation alone that an absolute grant had been made—a grant made, moreover, at a time when she was of tender age and just about to pass into the family of her husband.

If any presumption at all arises with regard to the practice of the custom in this family, it would seem to be that the zamindars took care that when their daughters and female relations married outside the family, a grip should be kept on any property which had in the meantime been granted them for maintenance. In this connexion, if we turn to the statement of Harpriabai made in Revenue Case No. 177 of 1917-18 which we called for by our order of 10-2-26, it is noticeable that when one of the legatees, the daughter Kolhabai died, her husband was also turned out of the village granted to her by way of maintenance. We do not imply in this connexion that we are dealing with an established custom, for the requisites of such a custom have not been made out. What we are concerned with is a matter of probabilities and in this case the indications are that these zamindars were not in the habit of carving out portions of the property as absolute gifts to their female relations.

In construing the nature of the grant given to Mt. Harpriabai, much importance attaches to her evidence on oath given in Revenue Case No. 177 of 1917-18 before the Assistant Settlement Officer. The lady had then applied to be declared inferior proprietor of mouza Ekodi, but her application was rejected. In her evidence the following passages occur:

Mouza Ekodi was given to me in dowry. It was a gift for my life and my children.

(We may here parenthetically remark that she admittedly had no children).

From the time the village has been given to me I am in possession and enjoyment of it. I have got no issue.

I am recorded wahiwardar malguzar for more than 50 years and my possession has been over the village all this time.

The village belongs to Rao Bahadur Indraraj Singh and I hold possession of it as wahiwatdar.

The zamindar pays the land revenue of the village and I pay to him Rs. 1,000.

I know that I am a wahiwatdar.

Although Mt. Harpriabai was obviously attempting to put the best colour she could on the nature of her possession in furtherance of the application she was then pressing, these admissions are quite irreconcilable with the position the defendant is now taking up. The appellant has admitted that the estate is an impartible and inalienable one and that the zamindar must remain its, so to speak, titular owner who is alone responsible to Government for land revenue and the like, but he has suggested that his client has acquired a species of inferior absolute right which has been carved out of the zamindar's right. We are unable, however, to find any sufficient evidence on record to support this theory.

The entries made at the settlement in this connexion have been suitably dealt with by the lower Court and we do not find it necessary to discuss them further in detail. Entries like those contained in P. 4, P. 5, D. 12, and P. 13 go strongly against the defendant's case and an undoubted presumption under S. 80, C. P. Land Revenue Act, 1917, arises in plaintiff's favour. Is it reasonable to suppose that, if the grant had been an absolute one, Harpriabai and Ramlal would have remained quiescent all these years? The answer must clearly be in the negative. Clearly a heavy burden rested on defendant of proving that he was entitled to hold against plaintiff and that burden has not been discharged. We are, therefore, of opinion that the defendant-appellant has failed to establish that the grant of mouza Ekodi was anything more than a maintenance grant to Harpriabai and her children—and she admittedly had no issue. Consequently on her death the village rightly reverted to the plaintiff-respondent. The decree of the lower Court is, therefore, in our opinion, correct and we dismiss the present appeal. Appellant must bear the respondent's costs. Costs in the lower Court as already ordered.

G.B.

Appeal dismissed.

*** A. I. R. 1927 Nagpur 276**

FINDLAY, J. C.

Mannalal—Plaintiff—Applicant.

v.

Secretary of State for India—Defendant—Non-applicant.

Civil Revision No. 139 of 1926, Decided on 7th March 1927, from the Order of the Small Cause Court Judge, Nagpur, D/- 19th February 1926, in Small Cause Suit No. 721 of 1925.

** Railways Act, S. 140—Notice given to other official than Agent is not sufficient.*

That some subordinate official is entrusted with authority by the Agent to dispose of claims brought against the company does not amount to delegation to such subordinate official the power to receive the notice as required by Ss. 77 and 140, Railways Act; 28 All. 552; A. I. R. 1922; All. 280; and A. I. R. 1923, All. 301; Foll.; A. I. R. 1924, Nag. 288, Diss. from. [P 277 C 1 & 2]

The provision contained in S. 140 must be strictly construed and notice given to any official other than the agent or the manager is an insufficient fulfilment of the requirements of S. 140. [P 277 C 2]

R. N. Padhay—for Applicant.

A. V. Khare—for Non-applicant.

Order.—The present plaintiff-applicant's suit against the G. I. P. Railway has been dismissed by the Judge of the Small Cause Court, Nagpur, on the ground that the requisite notice under S. 140, Indian Railways Act, had not been served in the case. On the day notice was given, the G. I. P. Railway was admittedly not a State railway, it having been taken over by Government some 3 months later. Nevertheless, notice, doubtless under a bona fide misapprehension, was served on the Manager, G. I. P. Railway, Bombay, whereas, under S. 140, Indian Railways Act, in the case of a railway administered by a railway company and not by Government, as was the case on the day in question as regards the G. I. P. Railway, the notice should have been served on the Agent.

Two positions have been taken up on behalf of the applicant. First, it is contended that he obviously intended to serve the notice on the highest officer of the railway and that the word "Manager" was, in reality, a mere mistake of nomenclature, which, in the circumstances, equally implied "Agent." Secondly, it has been suggested, on the strength of certain remarks of Batten, A. J. C., in *Deorao v. G. I. P. Ry. Co. (1)*,

(1) [1912] 8 N. L. R. 34=14 I. C. 684.

that, in any event, the present plaintiff-applicant should have been given an opportunity to prove that notice, which purported to be addressed to the General Manager, in reality, reached the Agent. This plea was put forward in paras. 2 and 4 of the plaintiff's rejoinder, dated 25th July 1925.

I have been referred to a decision of Kinkhede, A. J. C., in *Mulchand v. G. I. P. Ry. Co.* (2), in which the learned Additional Judicial Commissioner held that there was nothing in the Railways Act which prevents the railway administration or its Agent or Manager from deputing an officer to receive the notice required by S. 140, Railways Act. Agency in such connexion, the learned Additional Judicial Commissioner held, may be proved either by direct evidence of authority or by a course of conduct which, in the opinion of the Court, would justify the inference that the subordinate official was authorized to receive notice on behalf of the Agent.

For my own part, I must express, with all deference, my disagreement with the learned Additional Judicial Commissioner in this connexion. The provisions of S. 140 are absolute in my opinion and amount to mandatory provision that, before a suit can be filed, such notice must be served on the Manager or on the Agent, and the exact manner of service is more or less specified in detail. It seems to me a very far step from that to stipulate, as has been deemed to be done in the pleadings in the present case, that because the notice was addressed to a person described as the Manager, this notice, even if it came to the notice of the Agent, would prove a sufficient fulfilment of the requirements of S. 140, Railways Act.

I find myself in respectful agreement with the view of the Bench in *G. I. P. Ry. Co. v. Chandra Bai* (3), in this connexion. A similar view was taken also in *Ram Sahai v. E. I. Ry. Co.* (4). As was pointed out by Lindsay and Daniels, JJ., in *Cawnpore Cotton Mills Co., Ltd. v. G. I. P. Ry.* (5), it is one thing to say that some subordinate official may be entrusted with authority by the Agent

to dispose of claims brought against the company, and another thing to say that there was delegated to such subordinate official the power to receive the notice in suit as required by Ss. 77 and 140, Indian Railways Act. Whether, in view of the statutory provision on the subject, the Agent could delegate this power of receipt to any other official is a matter which does not seem to me to arise in the present case. In a recent case *G. I. P. Ry. Co. Ltd. v. Chandulal Sheopratap* (6), a similar view of the law has been taken.

The great weight of authority, in short, is in favour of the view, to which I am inclined, viz. that the provision contained, in S. 140 must be strictly construed that notice given to any other official other than the Agent or the Manager, as the case may be, is an insufficient fulfilment of the requirements of S. 140. In the present instance there was no presumption even of any such fulfilment as the notice was addressed to the Manager, an official who did not in terms exist at the time in the case of G. I. P. Railway. I see no reason, therefore, for interference and dismiss the present application. The applicant must bear the non-applicant's costs. Costs in the lower Court as already ordered.

R.K.

Application dismissed.

(6) A. I. R. 1926 Bom. 138=50 Bom. 84.

A. I. R. 1927 Nagpur 277

FINDLAY, J. C.

Yeshwant Rao Muley—Plaintiff—Appellant.

v.

Sadasheo Rao—Defendant—Respondent.

Second Appeal No. 151 of 1926, Decided on 9th March 1927, from the decree of the Dist. J., Nagpur, D/- 7th December 1925, in Civil Appeal No. 142 of 1925.

C. P. Tenancy Act (1920), S. 110—*C. P. Tenancy Act* (1898), S. 41—*Mortgage of occupancy holding prior to Act of 1920—Possession under mortgage decree taken after Act of 1920—Malguzar has no right to sue in ejectment.*

Where a mortgage of absolute occupancy holding was executed without malguzar's consent, when the Tenancy Act (1898) was in force, but possession in execution of decree on that mort-

(2) A. I. R. 1924 Nag. 288.

(3) [1906] 28 All. 552=3 A. L. J. 329=(1906) A. W. N. 101.

(4) A. I. R. 1922 All. 280=44 All. 645.

(5) A. I. R. 1923 All. 201=45 All. 353.

gage was taken by the mortgagee decree-holder after the Act of 1920 came into force :

Held : that the cause of action for ejectment suit by the malguzar arose on the date possession was taken and the new Act of 1920 not providing for an ejectment suit the malguzar's suit for ejectment was not maintainable : *A. I. R. 1927 Nag. 127, Affirmed ; (Case-law considered).* [P 279 C 1]

M. R. Bobde—for Appellant.

M. R. Indurkar—for Respondent.

Judgment.—The plaintiff appellant Yeshwant Rao's suit against the defendant-respondent Sadasheo Rao for possession of six absolute occupancy fields in mauza Amdi (Nagpur) was decreed by the first Subordinate Judge, second class, Nagpur. Plaintiff is malguzar and lam-bardar of the whole village. Defendant took a mortgage of the subjects from the tenant Bala on 30-6-11; he obtained a foreclosure decree on 4-1-20 and got possession of the fields through the Court on 30-7-24. Plaintiff's case further was that, as the amount concerned in the mortgage decree was Rs. 2,650 and the jama of the fields was Rs. 65, the mortgage required his consent under S. 41, C. P. Tenancy Act, 1898, and as this consent had not been obtained the mortgage was inoperative as against him and he was, therefore, entitled to possession.

Defendant admitted the main facts stated above. He also pled that one Godad had obtained a money decree against the original tenant Bala; that, in execution thereof, the fields were put up to auction; and that one Vithoba purchased them on 15-7-16 and duly obtained possession on 4-5-17. Since then Vithoba had been in possession until defendant sued both Bala and Vithoba on the former's mortgage and obtained possession as stated in para. 1 above. Bala's tenancy was, therefore, extinguished in 1917 and in any event the present suit was barred by limitation. Defendant further pled that under the C. P. Tenancy Act, 1920 plaintiff had no locus standi for bringing the present suit. An alternative position was also taken up by defendant to the effect that he had approached plaintiff in April 1924 before taking possession of the fields under his decree whereupon plaintiff informed him that he had given his consent to the mortgage and had no objection to defendant entering into possession. Plaintiff's rejoinder was to the effect that he had recognized Vithoba

as a tenant and that the present suit was governed by the Tenancy Act of 1898 and not of 1920, his substantive rights having accrued at a time when the old Act was in force.

The Subordinate Judge on the issues which arose on these pleadings, came to the following findings :

(a) That the suit was not barred by time in respect of Vithoba's tenancy since 1917;

(b) that plaintiff's rights accrued under the old Tenancy Act and that the new Act cannot and does not take away these rights; and

(c) that plaintiff had not given his consent to the defendant's mortgage.

On these findings plaintiff obtained a decree as already stated in the first Court.

The defendant appealed to the Court of the District Judge, Nagpur, that Court reversing the judgment and decree of the first Court and dismissing the plaintiff's suit instead. The learned District Judge held that the decisions in *Vinayak v. Mahebulha Khan* (C. A. No. 3 of 1921 Decided on 27-4-21) and in *Vithal v. Waman* (1) were inapplicable to the facts of the present case; that here possession was not taken until after the new Act came into force and that, therefore, previously to the date of the new Act coming into force, the plaintiff as landlord had not acquired a right to eject the defendant-respondent. The cause of action given in the plaint is shown as arising on 20-7-24. Finding it unnecessary, therefore, to consider the defendant's plea of consent, the District Judge upheld the appeal of the defendant.

Plaintiff has now come up on second appeal to this Court and the sole question involved is whether the rights of the plaintiff are governed by the provisions of the old or new tenancy law. In the meantime, while the present appeal was pending, I had occasion fully to consider this question in *Kedarnath v. Netram* (2) decided on 26th January 1927 and, for reasons stated in the connected judgment which need not be repeated here, I came to a conclusion adverse to the plea now put forward on behalf of the present appellant. I am asked now to reconsider my decision in the last-

(1) *A. I. R. 1925 Nag. 140=21 N. L. R. 139.*

(2) *A. I. R. 1927 Nag. 127=23 N. L. R. 50.*

quoted judgment and I proceed to discuss the argument which has been offered in this connexion.

The suggestion on behalf of the appellant is that, as this mortgage was executed under the old Tenancy Act, S. 6 of the Act of 1920 has no application as it only refers to transfers which have been effected since the latter Act came into force. The appellant, it is alleged, is in an unfortunate position as his right to re-entry into possession under the old Act had not fully accrued before the Act of 1920 came into force [cf. *Jodhraj v. Daulat* (3)] and, on the other hand, the right of pre-emption under S. 6 of the new Act is not available to him. The remarks of Skinner, A. J. C., at page 20 in *Udebhan v. Jagannath* (4) have been quoted in support of the contention that the rights of the mortgagee must be considered as having had effect as from the date of the mortgage suit which was admittedly filed when the old Act was in force, but I do not see how this decision can help the appellant. If the Act of 1898 had continued in force and no Act of 1920 had taken its place, obviously appellant's cause of action would not have accrued or matured in full until 30th July 1924. S. 110 of the Act of 1920, therefore, cannot in my opinion save appellant but this aspect of the matter I have fully discussed in my previous decision quoted above. The case is doubtless, from one point of view, an anomalous and possibly a hard one, but my duty is to administer the statute law as it stands and this being so, I see no reason to change my previous view, viz. that in the circumstances of this case, the transfer of possession only gave appellant his complete cause of action and this did not arise until the new Act was in operation which Act does not allow an action for ejectment like the present. If the legislature, when it framed the Act of 1920, had intended giving specific protection to persons, so to speak on the margin, with inchoate rights at the date of its coming into operation, an ad hoc provision in this connexion was necessary and none such exists. S. 110 being obviously incapable of covering the appellant's case, I therefore can see no reason to change the view of the law

taken by me in *Kedarnath v. Netram* (2) and am of opinion that the judgment and decree of the District Judge must be sustained. The appeal accordingly fails and is dismissed; appellant must bear the respondent's costs. Costs in the lower Courts as already ordered.

D.D.

Appeal dismissed.

A. I. R. 1927 Nagpur 279

HALLIFAX, A. J. C.

Garab Singh Gond—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 13 of 1927, Decided on 5th March 1927, from the Order of the Dist. Mag., Betul, D/- 20th January 1927, in Criminal Case No. 23 of 1926.

(a) *Hindu Law—Marriage—Rakshasa form prevails among certain Gonds of Berar and Betul.*

Rakshasa form of marriage, viz., the seizure of a maiden by force from her house, is at the present day practised among certain class of Gonds of Berar and of Betul. [P 280 C-2]

(b) *Penal Code, Ss. 366, 376 and 392—Custom of rakshasa marriage and subsequent consent by the girl does not prevent the acts technically constituting the offences.*

The fact that the rakshasa form is in vogue among the Gonds and the subsequent consent by the girl to the marriage, cannot prevent the previous acts of taking away the girl by force, having sexual intercourse with her, and removal of her bracelets to prevent the girl going away, from constituting the offences of wrongful confinement and robbery when they are committed; and it does not even reduce their culpability, but under these circumstances there is no necessity for a heavy sentence. [P 280 C 2]

G. P. Dick—for the Crown.

Judgment.—The appellant Garab Singh Gond is the mukoddam of the rayotwari village of Keria Umri in the Betul District. His servant Sadu Gond, who was tried and convicted along with him, has also appealed (criminal appeal No. 14 of 1927) and both appeals will be governed by this judgment. The facts on which the two convictions are based are very clearly established by the evidence, and indeed the denials of some of them by the accused can hardly be taken seriously. They are as follows:

Garab Singh desired Phula Gondin of the neighbouring village of Chhatar-

(3) A. I. R. 1922 Nag. 241=18 N. L. R. 103.

(4) [1910] 6 N. L. R. 17=5 I. C. 699.

pur as his second wife. She lived with her widowed mother Gengri (P. W. 6) and her father's brother Manju (P. W. 7). In November 1926 Phula was thirteen years and seven months old, but the Civil Surgeon (P. W. 4), who examined her in connexion with this case, found that "the hymen had been ruptured long ago" and said:

The parts were so well developed that I think that the girl is used to sexual intercourse.

During the afternoon of the 9th of November the two accused went to Manju's field, where Phula was alone, cutting the kutki crop, and carried her off by force to a field of Garab Singh. She struggled to escape, but was induced to keep quiet by no very gentle treatment. The two men compelled the girl to stay all night in the field with them, and during the night Garab Singh had sexual intercourse with her three times against her will. Early the next morning he returned home leaving Sadu in charge of the girl with instructions not to let her go away, and as additional security the silver bracelets (bankra) she was wearing were removed and Garab Singh took them away with him. During the forenoon a search-party came upon Sadu and Phula; Sadu fled and Phula was taken home. The object of the two accused was to compel Phula to marry Garab Singh.

On these facts the learned District Magistrate has convicted Garab Singh of offences punishable under Ss. 366, 376 and 392, I. P. C. and Sadu of offences punishable under the first and last of these three sections. The convictions are certainly correct, though there is no reason why Sadu should not have been convicted of rape also under provisions of S. 114, Penal Code. Both accused were sentenced to various concurrent terms of imprisonment, the result of the sentences being that Garab Singh is to suffer rigorous imprisonment for five years and Sadu for three. Garab Singh was also ordered to pay a fine of fifty rupees or else to undergo further rigorous imprisonment for six months.

In describing the eight forms of marriage among Hindus, of which the first four only are approved, Manu says of the seventh:

The seizure of a maiden by force from her house, while she weeps and calls for assistance, after her kinsmen and friends who have been slain

in battle or wounded, and their houses broken open, is the marriage styled rakshasa.

The commentary on this in Mayne's Hindu Law (p. 94) is:

The rakshasa form is simply the marriage by capture, the existence of which, coupled with the practice of exogamy, Mr. McLennan has tracked out in the most remote ages and regions. It is at the present day practised among the Meenas, a robber tribe of Central India, and among the Gonds of Berar not as a symbol, but a matter of real earnest—as real as any other form of robbery. The connexion between the rakshasa and the gandharva forms is evidenced by the fact that both were considered lawful for the warrior tribe.

Later the learned author says:

Manu permits the gandharva and rakshasa to a military man. Narada forbids the rakshasa in all cases.

The existence of the custom of marriage by capture among these particular Gonds of Betul, which adjoins Berar, is clearly established by the evidence in the present case. Phula's mother Gengri (P. W. 6) said:

I had two daughters, one of whom is married Bahadur my son-in-law had taken away my elder daughter similarly. I consented afterwards. Bahadur has no child. He married only two years ago. Phula is three years younger than Sukhya.

And the girl's uncle Manju (P. W. 7) said:

In our community if the girl is carried away marriages may take place afterwards if the girl consents afterwards. The same thing happened with Bahadur In our community two wives are allowed. Phula is not willing to marry Garab Singh. If she was, why should (she) have come here and why should she get so much beating?

These matters do not make the offences any the less abduction to compel marriage, rape and robbery, but they do greatly reduce the severity of the sentence it is necessary to inflict. The acts of the accused really constitute one offence, as the learned District Magistrate recognized in ordering that the terms of the imprisonment awarded should be concurrent. But those acts are no more than a proposal of marriage, made in a manner that is not considered even improper or particularly rude by the people among whom the custom exists, though like any other proposal, it may not be accepted. But subsequent consent cannot prevent the acts technically constituting wrongful confinement and rape when they are committed, and it does not even reduce their culpability. The removal of the bracelets also constitutes robbery, but it was merely one of the means adopted to

prevent the girl going away, and a part of the wrongful confinement, as Garab Singh obviously had no intention of keeping them permanently.

It seems clear that under these circumstances there is no necessity for a heavy sentence. The sentences of imprisonment passed on each accused are therefore, reduced to one of rigorous imprisonment for six months for each of the offences of which he has been found guilty, the convictions and also the order that all the periods of imprisonment shall be concurrent being maintained. The sentence of fine and imprisonment in default passed on Garab Singh is also maintained, though there seems no reason why he should have been made to pay any more than enough to compensate the girl.

R.K.

Sentences reduced.

A. I. R. 1927 Nagpur 281

FINDLAY, J. C.

Shrimant Kunwar Laxmanrao—Plaintiff—Appellant.

v.

Budhulal—Defendant—Respondent.

First Appeal No. 22 of 1926, Decided on 16th February 1927, from the decree of the Sub-J., 1st Class, D/- 30th November 1925, in Civil Suit No. 9 of 1924.

Contract Act, S. 73—Contract to supply goods—Advance to be adjusted in final settlement—Purchaser committing breach—Purchaser is entitled to the balance in supplier's hands.

The incidents of earnest-money in an agreement of sale-transaction have no application to a contract for sale of goods when money is advanced to the supplier on the understanding that the original advance was to be immediately adjusted or was only to be adjusted in the final settlement of the contract between the parties. In such cases the purchaser is entitled to the balance remaining with the supplier.

[P 282 C 2; P 283 C 1]

K. P. Vaidya—for Appellant.

S. B. Gokhale—for Respondent.

Judgment.—The plaintiff-appellant, Shrimant Kunwar Laxmanrao of Nagpur filed the present suit against the defendant-respondent, Budhulal for damages assessed at Rs. 9,182-1-3, in respect of an alleged breach of contract. His case was that the defendant on 20th February 1920, entered into a written agreement with him (cf. P. 1) to supply 20 lacs of

table-bricks of the size $8\frac{3}{4}" \times 4\frac{1}{2}" \times 2\frac{3}{4}"$ at Rs. 16 per thousand and 10,000 Allahabad tiles at Rs. 45 a thousand, the tiles to be delivered in Nagpur free of all costs. The contract was to be completed within three years from the date of the agreement. The plaintiff's case further was that the defendant had, in pursuance of the agreement, only delivered 3,42,120 bricks to the Public Works Department at Nagpur, and that, although he had been pressed on several occasions to complete the contract, he had failed to do so. The plaintiff had advanced from time to time a total amount of Rs. 7,975 to the defendant under the contract. On the balance of account, after allowing for town duty and rejected bricks and damage claimed in respect of the difference between the market rate prevailing for bricks and the contract price and in respect of the undelivered material, the above sum of Rs. 9,182-1-3 was claimed.

The defendant's position was that he duly admitted the kararnama (P. 1) and that he had supplied 3,97,000 bricks and not 3,42,120 bricks as alleged by the plaintiff, the bricks having been delivered on various dates in the early part of 1921. He duly admitted further having received advances or payments amounting only to Rs. 7,975. The defendant's case was, however, that the plaintiff under the contract was only entitled to bricks of the size specified above, which, according to the plaintiff, were required for the construction of a new palace in Nagpur. Later on, however, the plaintiff asked the defendant to supply a larger size of brick as he had entered into a contract with the Public Works Department to supply them with this larger size, the dimensions in this case being $9" \times 4\frac{1}{2}" \times 3"$. Defendant declined to supply these bricks, as they were not according to the specification in the agreement. Thereafter, the plaintiff's agent agreed to pay Rs. 3 a thousand towards the extra cost of the larger kind of brick, but although 3,97,000 bricks of the larger size were supplied, the extra rate was not paid. Defendant continued to offer supply of the small sized bricks but these were refused by the plaintiff. In those circumstances the defendant pleaded that the plaintiff was, in reality, liable for the breach of contract. He also offered counter-allegations.

gations as to the market rate for bricks of the larger size, which prevailed on 20th February 1920, and disputed various other matters of detail which formed part of the plaintiff's case. (Here the judgment narrated the issues and findings of the lower Court and proceeded.) The first point which arises for consideration is whether the original contract between the parties was varied by an agreement between the plaintiff's Kamdar, Moinuddin, and the defendant in order to obtain the supply of bricks of the larger size instead of the size specified in P. 1 and whether it was agreed to pay Rs. 3 per thousand extra for the said larger size of bricks. (The judgment then discussed the evidence on these points and finding, that the understanding must have been that the defendant was to supply bricks of the larger and standard size, the only ones which the Public Works Department would accept, and that the defendant must have delivered bricks of the larger size on the understanding that he would be paid extra therefor, but that the plaintiff or his agents were attempting all through to enforce delivery of the larger sized bricks at the rate agreed for the smaller, and proceeded.) I now come to the question of whether the plaintiff is entitled to demand refund of the surplus of Rs. 1,475 which admittedly now remains with the defendant. The Subordinate Judge's method of disposal of this item was not, in my opinion, a satisfactory or legal one. He takes into account an allegation of the defendant to the effect that he intended filing a separate suit for damages in view of the breach of the contract by the plaintiff, and the lower Court has held that under these circumstances the surplus in question should be forfeited towards compensation due to the defendant. In the first place, it is not clear how the lower Court could be certain that the damages, if any, the defendant could claim would amount to Rs. 1,475. The probabilities are against the defendant having suffered any material loss, for it is obvious that he had the larger bricks on hand and could have been able to arrange, and did so far arrange, a contract with the Public Works Department on far more remunerative terms than the plaintiff's contract would have been. In this Court the learned counsel for the defendant has

candidly admitted that he is prepared to agree to a refund of Rs. 500 being the advance made on 8-3-20, but he has urged that the plaintiff is not entitled to recover whatever balance may be left on the general account out of the original advance of Rs. 2,625. In this connexion he has relied on the following decisions: *Mangalal v. Mt. Nanni* (1); *Natesa Aiyar v. Appavu Padayachi* (2); and *Kunwar Chiranjit Singh v. Har Swarup* (3).

In the first quoted case the contract concerned was a voidable one and Drake-Brockman, J. C. pointed out that where a contract goes off by default of the purchaser, the vendor is entitled to retain the deposit. A similar view was taken by a Bench of the Madras High Court in the Madras decision quoted, and their Lordships of the Privy Council have laid down a similar rule in *Kunwar Chiranjit Singh v. Har Swarup* (3). These were, however, all cases as between purchaser and vendor, whereas here we are concerned with an advance which, according to the varying allegations of the parties, was to be taken into account in the immediate part-performance of the contract, which were to follow, or on the allegation of the plaintiff the arrangement was that the amount of each advance was only to be adjusted in the final settlement on completion of the contract. P. 1 is silent on the question of the appropriation of the advance and, in the circumstances, I do not consider it necessary to discuss the relative reliability of the oral evidence on each side as to how the original advance was to be adjusted. In either event it seems to me, in the circumstances of this case, that the plaintiff is entitled to the refund of the amount of Rs. 1,475. It is fairly obvious that at the start the plaintiff financed the defendant with a view to the latter setting up a brick factory which he had not otherwise ready cash available to construct. It is equally obvious that in the meantime he has made profit out of the factory in other directions, and I do not think the incidents of earnest-money in an agreement of sale transaction have any application to the circumstances of

(1) A. I. R. 1922 Nag, 104=19 N. L. R. 131.

(2) [1913] 38 Mad. 178=24 M. L. J. 488=19 I. C. 462=(1913) M. W. N. 341.

(3) A. I. R. 1926 P. C. 1.

this case as to whether the understanding between the parties was that the original advance was to be immediately adjusted or was only to be adjusted in the final settlement of the contract between the parties. In those circumstances the plaintiff's claim succeeds only as regards the balance of Rs. 1,475 which has been disallowed by the Judge of the lower Court and the rest of his claim is dismissed. I see no reason to allow him interest on the amount of Rs. 1,475 now to be decreed, because, in the circumstances of this case, it is perfectly clear that he has been responsible for the breach of the contract and for the consequent impasse which resulted.

The judgment and decree of the lower Court are accordingly reversed and instead a decree for Rs. 1,475 will issue in favour of the plaintiff-appellant against the defendant-respondent. The latter will bear the plaintiff-appellant's costs in both Courts on this amount, while the plaintiff-appellant will bear the defendant-respondent's costs in both Courts on the balance of his claim as now dismissed.

R.K.

Appeal allowed.

A. I. R. 1927 Nagpur 283

FINDLAY, J. C.

Bhikaji Vyankatesh Dravid & Co.—Applicant.

v.

Commissioner of Income-tax, Nagpur—Non-Applicant.

Misc. Application No. 13-B of 1926, Decided on 17th March 1927, against the Order of the non-applicant, D/- 17th February 1926.

Income-tax Act (1922), S. 63 (2)—Assessee not giving evidence to support his verified return when called upon—Accounts of previous year not supporting the return—Income-tax authorities are entitled to draw presumption from matters as existing in previous year.

When the account books of the previous years do not support the verified return and assessee's statement on oath, and the assessee fails to make use of the opportunity given to him, to substantiate his allegation the income-tax authorities are entitled to draw a presumption from the state of matters which had admittedly existed in previous years and in doing so no error of law is committed by the income-tax authorities which would justify the High Court,

calling on the Commissioner of Income-tax for a reference : *A.I.R. 1924 Cal. 337. Dist. [P 284 C 2]*

G. L. Subhedar and R. R. Jaywant—for Applicant.

G. P. Dick—for Non-applicant.

Order.—The applicant Rao Sahib Bhikaji Vyankatesh Dravid & Co. has applied to this Court for a mandamus requiring the Commissioner of Income-tax to state a case under S. 66, sub-S. (2) Indian Income-tax Act, 1922, for decision by this Court.

The facts of the case are sufficiently given in the application and need not be repeated here. On the application coming on for hearing to-day, only the first point contained in the final paragraph of the application was pressed. The case for the applicant company in this connexion is that, in the verified return submitted by the applicant as well as in his statement on oath made before the income-tax officer on 20-9-25, certain losses were shown as debitable to the partnership concerned, whereas the assessing officer held that these losses were the concern of Rao Sahib B. V. Dravid in his personal capacity. The alleged legal point which is raised on behalf of the applicant is that in the present case we had the verified statement of the applicant, as well as his oral statement on oath to the opposite effect. In addition there were the entries in the partnership account books for the year in question. On behalf of the income-tax authorities, it is alleged, there was no evidence on the other side. It is urged that the income-tax authorities have, in these circumstances, erred in law in holding that the transactions in question were personal ones and should not have been incorporated in the partnership account. In support of this position, the decision of Sanderson, C. J., in *Bishnu Priya Chowdhurani: In the matter of a petition of* (1) has been relied on. In that case an assessee had stated that he had derived no income from certain lands. The Assistant Commissioner of Income-Tax required the assessee to prove his negative assertion and, in the absence of such proof, the assessment was confirmed. Sanderson, C. J., in the said case, held that the ordinary principle of evidence applied and that the burden of proof was on the party which would fail if no evi-

(1) *A. I. R. 1924 Cal. 337=50 Cal. 907.*

dence were produced, i. e. in the said case on the officers of the Income-Tax Department.

The present case, however, seems to me to be clearly distinguishable from the Calcutta case referred to. Here the facts are that up to the year we are concerned with the connected transactions relating to analogous debits took place on the applicant's private account. This is admittedly so, but the explanation offered by the applicant is that in the year in question there had been no combination of ginning factories as there had been in previous years, and it was owing to this that the applicant carried on purchases for the partnership and not, as in previous years, on his own personal account. Moreover, it was apparently not until the end of the year that the debits in question were made in the partnership account. In these circumstances, it seems to me impossible to hold that there was no evidence on the side of Government to favour the view that items of debit were wrongly incorporated in the partnership account. Moreover, under S. 23 (2), Income-Tax Act, 1922, the income-tax officer had power to call on the assessee to produce evidence on which he relied in support of the return. Notice to this effect issued to the assessee on the 20th of September 1925, but he apparently produced no other evidence except that of himself. A somewhat unsatisfactory explanation is given that the applicant could not produce D. G. Dravid as a witness as he would have proved hostile to him, but presumably, had this been the case, the Income-Tax Commissioner would have allowed him to have been cross-examined by the applicant. I do not, therefore, think that it can be predicated of the present case that there was an error or mistake of law on the part of the income-tax officer.

The circumstances of the case, as regards the debiting of these items in the personal account, were not free from suspicion. The income-tax officer was perfectly entitled to draw a presumption from the state of matters which had admittedly existed in previous years, and in the present state of income-tax law an onus rested on the assessee of discharging his contention that the debits were properly made in the partnership accounts as opposed to being personal

ones of his own. That onus was not sufficiently discharged by his verified return and statement on oath, and he failed to make any use of the opportunity given to him of producing other evidence in support of his allegation. The case from this point of view seems clearly outside the purview of the principle laid down in the Calcutta decision quoted above, and it seems to me impossible to hold in the circumstances that any error of law has been committed by the income-tax authorities which would justify my calling on the Commissioner of Income-Tax for a reference to this Court.

The application is accordingly dismissed. I allow Rs 50 as pleader's fees. The applicant must bear the non-applicant's costs.

D.D.

Application dismissed.

A. I. R. 1927 Nagpur 284

FINDLAY, J. C.

Seth Kisanlal—Plaintiff—Appellant.
v.

Kisan Singh and others—Defendants—Respondents.

First Appeal No. 70 of 1926, Decided on 8th April 1927, from the decree of the Dist. J., Chhindwara, D/- 22nd April 1926, in Civil Suit No. 24 of 1924.

Contract Act, S. 74—Instalment bond—In default of two instalments whole amount to become due with compound interest—Condition is penal.

Where a mortgage instalment bond was originally to carry interest at approximately 12 annas per cent. per mensem, but if a single instalment were defaulted, interest was to run at Re. 1 per cent per mensem, and if two instalments in succession were defaulted, the whole amount was to become exigible and still further that amount was to carry yearly compound interest:

Held: that S. 74 would apply and the provision of exigibility of the whole amount with compound interest in the case of default of two instalments was penal.

[P 286 C 2, P 286 C 1]

*M. R. Bobde—*for Appellant.

*V. R. Dhoke—*for Respondent No. 4.

Judgment.—The plaintiff-appellant, Seth Kisanlal, has filed this appeal against the judgment and decree of the District Judge, Chhindwara, in civil suit No. 24 of 1924. In the said judgment and decree, the learned District

Judge held that the stipulations as regards interest in case of default of two instalments under the mortgage deeds in suit were penal and he accordingly disallowed compound interest at 1 per cent. per mensem, and only allowed simple interest at the same rate. If compound interest, according to the terms of the mortgage deeds (P. 1, P. 2 and P. 3), be allowed, admittedly a sum of Rs. 1,565-14-8, in addition to the amount decreed by the lower Court, is exigible, and it is this amount which is claimed in the present appeal.

It will be convenient, first of all, to state the terms of the three mortgage deeds in suit. All three were executed on the same date and in each the principal was Rs. 1,000. In P. 1, Rs. 330 were added as prospective interest, making a total principal of Rs. 1,330; this was repayable in five instalments of Rs. 266 each. The first instalment was due on Mageshir Sudi 1, Fasli 1321, corresponding to the English date 21-11-1911. The fourth and fifth instalments under P. 1. were, therefore, due on 18-11-14 and 7-12-15, respectively. In the case of P. 1, all the first four instalments were paid and only the fifth instalment was defaulted. In case of default of any one instalment, the condition laid down in P. 1, was that interest should accrue thereon at 1 per cent. per mensem till satisfaction from the date of default. In case of default of two instalments, the whole amount should be payable at once with interest at 1 per cent. per mensem with annual rests.

In the case of P. 2 and P. 3, the remaining two bonds, the conditions were precisely similar with the exception that the prospective interest added was Rs. 5 extra, viz. a total of Rs. 335, and the yearly instalments payable were thus Rs. 267 each. In the case of P. 2 and P. 3, however, the last three instalments were defaulted, so that the final condition as regards the exigibility of the whole amount with compound interest at the higher rate of Rs. 1 per cent. per mensem is alleged by the plaintiff-appellant to have come into operation.

In the first place I may point out that it is erroneous to suppose that the original rate of interest, under which Rs. 330 was included in the principal of P. 1, and Rs. 335 in the principal of P. 2 and P. 3 respectively, works out at only

a rate of 6 annas per cent. per mensem. If, in the case of any one of these bonds, instalments had been paid punctually year by year for the five years, during which the principal was to be repaid, the original rate of interest, in reality, works out at something over 12 annas per cent. per mensem. I may also at this stage say that, in my opinion, there is no basis whatever for the contention which has been urged by the pleader for the fourth respondent, who alone appeared to contest the present appeal, that the condition contained in the bonds does not provide for compound interest. The terms of the bonds, so far as default of two instalments is concerned, clearly imply that there were to be yearly rests and this can only mean compound interest in the circumstances of the case.

The only question, therefore, which requires decision in the present appeal is whether, if S. 74, Contract Act, applies to the present case, the provision of exigibility of the whole amount, with compound interest in the case of default of two instalments was a penal one which should be relieved against.

In the first place it has been urged on behalf of the plaintiff-appellant that S. 74, Contract Act, does not apply *proprio vigore* to the facts of the present case. In this connexion reliance has been placed on the decision of Hallifax, A. J. C., in *Seth Ajodhia Prasad v. Shio-prasad* (1). That decision was delivered after the Bench case in *Purushottam v. Sahu Gond* (2) had been published and were there anything irreconcilable in the principles laid down in the single Judge case first quoted, I should have been bound to follow the Bench case unless I saw reason now to differ from the judgment delivered by my learned brother Prideaux, A. J. C., and myself in the case referred to. In those circumstances I do not find it necessary to discuss in detail the question whether there is any divergence between the two judgments in question, but I may point out that illustrations like (d), (f) and (g), S. 74, Contract Act, do not suggest that the legislature considered, in framing the said provision, that the section was likely to be rarely applicable to cases of failure to pay money due.

(1) A. I. R. 1927 Nag. 15=22 N. L. R. 160.

(2) A. I. R. 1926 Nag. 90=22 N. L. R. 23.

As at present advised, therefore, I see no reason to differ from the view taken by Prideaux, A. J. C., and myself in the Bench case quoted. That being so, it remains to be decided whether, on the principles laid down in that case, the lower Court was correct in giving the relief it did in the present instance.

It has been urged on behalf of the present appellant that the terms of the mortgage deeds in question were in the present instance very lenient and that the parties must have intended that these terms would be literally enforced. The original rate of interest, which, as I have shown above, in reality amounted to approximately 12 annas per cent. per mensem, was in itself undoubtedly not a high rate under the conditions prevailing in these provinces, nor was the provision for the interest being increased to 1 per cent. per mensem on any single instalment being defaulted. The crux of the matter, however, arises when we pass to the further provision, that if there were two instalments in default, the whole amount due was to become exigible and compound interest thereon was to run at 1 per cent. per mensem.

For my own part, I can see no reason whatever, in the circumstances of the present case, for not applying to it the principles laid down in *Purushottam v. Sahu Gond* (2). The bonds were originally to carry interest, as I have shown at approximately 12 annas per cent. per mensem. If a single instalment were defaulted, interest was to run at Re. 1 per cent. per mensem. This, in my opinion, formed the primary contract in the case. Thereafter, as was pointed out by Sundara Ayyar, J., in *Muthukrishna Iyer v. Sankaralingm Pillai* (3), we pass in the present instance from the primary to the secondary contract which was to the effect that if two instalments in succession were defaulted, an entirely new condition of affairs was to arise. Thereafter, in effect, a further double penalty was to ensue because the whole amount was to become exigible and still further that amount was to carry yearly compound interest. The case, therefore, in my opinion, is clearly one which falls within the purview of S. 74, Contract Act, and, in the particular

circumstances, I am of opinion that the defendant-respondents were clearly entitled to some relief. It may not have been obligatory on the plaintiff to have sent any formal notice with regard to the entirely new condition of affairs which had arisen, but it is nevertheless significant that no such notice was promptly sent. The default admittedly occurred in November 1914 and yet the plaintiff has deliberately chosen to remain quiescent until for some ten years later, the suit only having been filed on the 5th December 1924.

Even, on the decree granted by the lower Court, an amount of Rs. 5,500-2-6 has been granted and if we take into consideration the fact that the real initial principal under the three bonds which remained unpaid on the date of default excluding the original interest included in the bonds, only amounted to Rs. 1,400, there can be no question but that the plaintiff-appellant has already received very reasonable compensation in respect of the breach of the contract by the defendants. I do not think, therefore, that, in the circumstances of the present case, to which, in my opinion, S. 74 of the Indian Contract Act is applicable, there is any ground for holding that the learned District Judge erred in disallowed the claim for compound interest. There can be little question but that the plaintiff has already received under the decree even more than reasonable compensation for the breach of contract involved. The appeal is accordingly dismissed. The appellant must bear the respondents costs. Costs in the lower Court as already ordered.

R.K.

Appeal dismissed.

A. I. R. 1927 Nagpur 286

FINDLAY, J. C.

Haji Diwan Sujat Ali Khan—Decree-holder—Applicant.

v.

Bhao Singh, and others Judgment-debtor and Objectors—Non-applicants.

Civil Revision No. 87 of 1927, Decided on 28th April 1927, from an Order of the 2nd Cl. Sub-J., Seoni, D/- 15th January 1927, in Misc. Case No. 52 of 1926.

(3) [1913] 36 Mad. 229=18 I. C. 417=24 M. L. J. 135 (F. B.).

(a) *Civil P. C., O. 21, R. 63—Order under R. 60 or R. 61—Revision lies.*

The word "conclusive" in R. 63 is equivalent to "unappealable" and does not preclude revision in the case of an order under R. 60 or R. 61 in proper cases: A.I.R. 1923 R. 195, E. [P 287 C 2]

(b) *Civil P. C., O. 21, R. 58—Enquiry under—Court should not go into questions of title.*

In an enquiry under R. 58 it is the duty of the Court to determine the question of possession merely and not to go into the further question of title, so long as it is clear that the judgment-debtor is holding on his own behalf: 29 Cal. 543 and A. I. R. 1924 C. 744, Ref. [P 288 C 1]

M. R. Bobde—for Applicant.

N. G. Bose—for Non-applicants.

Order.—The decree-holder, Haji Diwan Sujat Ali Khan, a ward of the Court of Wards, Seoni, applies for revision of an order, dated 15th January 1927, passed by the Subordinate Judge, second class, Seoni, in miscellaneous case No. 52 of 1926. The decree-holder-applicant obtained, on 30th July 1923, a decree against the judgment-debtor, non-applicant 1, Bhao Singh, in respect of land revenue due by the latter to the former in respect of mauza Khursipar. The applicant is superior proprietor and the judgment-debtor, Bhao Singh, is inferior proprietor of the said village. The decree in question was a simple money one, and in execution thereof the decree-holder attached a 10 anna 8 pie share held by Bhao Singh in the village. The non-applicants 2 to 4, Seth Lakhmi-chand, Seth Kesrichand and Seth Tara Chand, filed an objection to the attachment on the ground that they had purchased the share at an auction sale held in respect of another decree. The decree-holder applicant alleged that the share was attached from the possession of the judgment-debtor Bhao Singh that the decree was in respect of the land revenue of the village, and that as such the decretal amount was a species of charge under S. 122, Land Revenue Act, 1917. The Subordinate Judge found that as the auction purchase in favour of the non-applicants 2 to 4 had been confirmed by this Court on 21st October 1924, the objectors were the owners of the share in question. He also held that the decree obtained by the present applicant was a simple money one and did not specifically bind the village share in question. He further was of opinion that, although the objectors had not got the actual possession of

the village share before the attachment the title had, in reality, passed to the auction-purchasers 2 to 4 and that the judgment-debtor must, in the circumstances, be held to have been in possession of the property as if in trust on behalf of the non-applicants 2 to 4. Holding, thus, that these non-applicants were impliedly in possession at the time of the attachment, he, therefore, released the village share on their objection. Against this order, the present applicant has now filed the present petition for revision.

On the petition for revision coming on for hearing, the pleader for the non-applicants 2 to 4 raised a preliminary objection to the effect that, having regard to the provision contained in O. 21, R. 63, Civil P. C., no application for revision lay and that the present applicant's remedy was by way of a regular suit as laid down in the said rule. In support of this position, the decision in *Phomon Singh v. A. J. Wells* (1) was quoted. That decision is, in reality, authority for precisely the opposite view to that advanced on behalf of the non-applicants. As Duckworth, J., pointed out therein, the word "conclusive" in R. 63 is, in reality, equivalent to "unappealable" and does not preclude revision in the case of an order under R. 60 or R. 61, where the Court concerned has failed to exercise a jurisdiction vested in it and has exercised a jurisdiction not vested in it or has otherwise acted illegally or with material irregularity. I do not think, therefore, that the present application for revision was barred and it only remains to decide whether there are sufficient grounds for interference having regard to the language of S. 115, Civil P. C.

I may say at once that the first two grounds of the petition of revision, which relate to the contention that the decree held by the applicant implies a charge on the land, were not seriously pressed and, in any event, I do not think they had any chance of success in view of the fact that the decree in question was a money decree simpliciter.

I pass, therefore, to the much more important point which has been put forward on behalf of the applicant. That point is that, on the date on which the attachment was made, the judgment-

(1) A. I. R. 1923 Rang 195=1 Rang. 276.

debtor was admittedly in possession. It has been urged in this connexion that what the lower Court wrongly did was, in reality, to go into the question of title and to hold that, in reality, the judgment-debtor was holding on behalf of the auction-purchasers. It has been frequently pointed out that in an enquiry under the provision we are concerned with it is the duty of the Court to determine the question of possession merely and not to go into the further question of title, so long as it is clear that the judgment-debtor is holding on his own behalf; of *Monmohiney Dasse v. Radha Kristo Dass* (2) and *Najimunnessa Bibi v. Nacharuddin Sardar* (3).

On the whole, in the circumstances of the present case, I am of opinion that the objectors have failed to establish that the property in question was in the possession of the judgment-debtor Bha Singh, not on his own account but on their account. Eventually, further litigation ensued as between the judgment-debtor and the objectors, and I can find no sound basis, in the circumstances of the present case for holding that the objectors were, on the date of attachment, impliedly in possession. Possession could only be obtained by them after formal application to the Court concerned. In my opinion, therefore, the Subordinate Judge exercised a wrong jurisdiction in releasing the property from attachment as he did. The order, revision of which is sought, is accordingly reversed and the objection filed by the non-applicants 2 to 4, dated 17th July 1926, is dismissed. The lower Court will now proceed to dispose of the execution application of the present applicant, dated 12th March 1926. The applicant's costs in this Court will be borne by the non-applicants who will also bear their own.

D.D.

*Order set aside.***A. I. R. 1927 Nagpur 288**

HALLIFAX, A. J. C.

Ganpati—Defendant 2—Appellant.

v.

Vithal and others—Plaintiff and Defendants 1, 3 and 4—Respondents.

Second Appeal No. 185 of 1926, Decided on 11th February 1927, from the decree of the Addl. Dist. J., Chanda, D/- 10th December 1925, in Civil Appeal No. 24 of 1925.

(a) *Wajib-ul-arz*—*Malik-makbuza* holder is not an agriculturist of the village—He cannot graze cattle free of charge.

Persons, who are not tenants or agricultural labourers, but hold a considerable area of malik makbuza land which lies within the confines of a village are not agriculturists of the village and so cannot graze their agricultural cattle free of charge. [P 289, C 1]

(b) *Wajib-ul-arz*—*Agriculturist* includes tenants or labourers, but they must be of the mahal concerned.

The term "agriculturist" comprises all who make a living from a direct connexion with agriculture, and in it are included not only tenants but also agricultural labourers, but, however wide the term "agriculturist" may be, it can only cover agriculturists of the mahal to which the *wajib-ul-arz* relates. [P 289, C 1]

K. V. Deoskar—for Appellant.*M. R. Bobde*—for Respondents.

Judgment.—The respondent Vithal, who is the malguzar of Chora in the Warora tahsil, sued four members of a joint Hindu family for payment of "grazing dues" for three years. It was agreed that, if the defendants are liable to pay anything for grazing their cattle, the proper amounts are Rs. 10 for their agricultural cattle and Rs. 20 for the rest. The decree of the first Court ordered them to pay Rs. 20 and both parties appealed. On the plaintiff's appeal it was found that the amount due to him was Rs. 30 and the defendants' appeal was dismissed.

The present appeal against the dismissal of the defendants' appeal is filed by the defendant 2 Ganpati alone. It relates only to the Rs. 20 allowed for the non-agricultural cattle, the liability for which was admitted. But all the defendants together filed at the same time another appeal (S. A. No. 186 of 1926) against the decree allowing the plaintiff's appeal, that is to say, against the finding that they have to pay for their agricultural cattle, the proper amount for that being admittedly Rs. 10. That question will be considered in this judgment.

(2) [1902] 29 Cal. 543.

(3) A. I. R. 1924 Cal. 744=51 Cal. 548.

The defendants are not tenants of the plaintiff, but hold a considerable area of malik makbuza land which lies within the confines of his village. They base their claim to free grazing for agricultural cattle on the provisions of the wajib-ul-arz of the village. But that has nothing to do with them. Their land is no more a part of the village by the land of which it happens to be surrounded than it would be if it were ten miles away; it is really a separate mahal, though that term is not used for mulik makbuza land. It is not even so much a part of the mahal in which it lies as it was before S. 64 of the old Land Revenue Act was repealed by Act 2 of 1917.

The part of Cl. 10 of the wajib-ul-arz on which the defendants base their claim to free grazing with the other inhabitants of the village runs as follows:

Agriculturists will be permitted to exercise, free of charge or hindrance, their rights of grazing agricultural cattle on the waste The term 'agriculturist' comprises all who make a living from a direct connexion with agriculture, and in it are included not only tenants but also agricultural labourers.

The defendants are not tenants and will hardly call themselves agricultural labourers, but, however wide the term "agriculturist" may be, it can only cover agriculturists of the mahal to which the wajib-ul-arz relates, and therefore cannot cover the defendants.

Both appeals will be dismissed and the defendants will be ordered to pay the whole of the plaintiff's costs in all three Courts. The learned Judge of the lower appellate Court avoided the common mistake of allowing his reader to fix the pleader's fee at some ridiculous and inadequate amount, but, in fixing it himself at ten rupees for both appeals, he omitted to notice that that mistake had been made in the first Court, where the pleader's fee allowed was two rupees. The pleader's fee in this Court will be thirty rupees, and the whole of it will be shown as costs in the appeal by all four defendants.

R.K.

*Appeals dismissed.***A. I. R. 1927 Nagpur 289**

HALLIFAX, A. J. C.

Sadhasheo Rao—Plaintiff—Appellant.
v.

Manboth and another—Defendants—Respondents.

Second Appeal No. 163 of 1926. Decided on 27th January 1927, from the Decree of the Dist. J., Raipur, D/- 9th December 1925, in Civil Appeal No. 45 of 1925.

Registration Act, S. 47—Sale-deed compulsorily registrable—Release of attachment between execution and registration does not invalidate sale—Civil P. C., S. 64.

A sale-deed of certain immovable property worth more than Rs. 100 was executed on the 4th of December 1912. The property was then under attachment. It was released from that attachment on the 10th of December. The sale-deed was registered on the 13th of February 1913.

Held: that the transfer was made on the date of registration because if the deed had not been registered there would have been no transfer at all. That for certain purposes, or even for all purposes, it took effect as from the date of execution has nothing to do with the date on which it was made. [P 289 C 2]

R. R. Jaywant—for Appellant.

B. K. Bose and P. N. Rudra—for Respondents.

Judgment.—The learned District Judge has based his dismissal of the suit on a decision of one point of law only, which is discussed in a judgment of some length. The decision seems correct, but the suit could have been dismissed on several other grounds, which required much less argument than that matter ever really required, which is much less than it got.

The matter is this: A sale-deed of certain immovable property was executed on the 4th December 1912. The property was then under attachment and in the hands of the Collector for sale. It was released from that attachment on the 10th December. The sale-deed was registered on the 13th February 1913. It is clear that the transfer was made on the date of registration, because if the deed had not been registered there would have been no transfer at all. That for certain purposes, or even for all purposes, it took effect as from the date of execution has nothing to do with the date on which it was made.

But the suit could have been dismissed on two matters of fact, of which the

decision was fairly obvious though none was given. One fact is that the Collector did give permission in writing for the sale to be made. The evidence here is the same as that in the closely connected case brought by the same plaintiff against Anjor Singh (C. S. No. 135 of 1923), and the discussion of it in the appellate judgment of this Court (S. A. No. 423 of 1924) need not be repeated.

The other fact is that the whole of the consideration of the two transfers, Rs. 9,000, is proved to have been taken and used for the satisfaction of debts antecedently due by the plaintiff's father who made the transfers. The amount paid to Hirderam in satisfaction of the decree under which the village had been attached was Rs. 5648-12-0, and a further sum as interest. A mortgage held by one Bisram was also satisfied by the payment of Rs. 3373-4-0. That gives a total of Rs. 9,022, even without the sum paid as interest to Hirderam and the costs of the two conveyances.

But even this matter of antecedent debt is as far outside the case as the unnecessary aspersions cast on his dead father by the plaintiff, because the property conveyed was not the ancestral property in his father's hands; it is shown in this Court's judgment in *Anjor Singh's* case (S. A. No. 423 of 1924) to have been inherited by him from his maternal grandfather.

The appeal will be dismissed, and the appellant must pay the whole of the costs of both parties in all three Courts. The pleader's fee in this Court for each respondent will be a hundred rupees.

D.D.

Appeal dismissed.

A. I. R. 1927 Nagpur 290

KINKHEDE, A. J. C.

Gulam Jafar and another—Plaintiffs—Appellants.

v.

Ramdhan and another—Defendants—Respondents.

First Appeal No. 48-B of 1926, Decided on 27th April 1927, from the Decree of the 2nd Addl. Dist. J., Akola, D/- 31st March 1926, in Civil Suit No. 2 of 1924.

(a) *Guardian and Wards*—Guardian, entitled to a share, transferring whole property on minor's behalf only—His share does not pass—*Evidence Act*, S. 115.

Where a Mahomedan widow who had one-eighth share, alienated property on behalf of her minor children but it did not appear either from the recitals or from evidence on record that she intended or contracted to transfer property, or any portion thereof in her own individual right. *Held*: the alienation was not valid to the extent of her share. [P 292, C 1]

(b) *Contract Act*, S. 65—Contract on behalf of minor by a person disqualified by personal law to represent the minor, is void—Minor need not refund the consideration.

Where a minor's property is alienated by a person who is himself competent to contract, but who is disqualified from acting on behalf of a minor under the law applicable to the minor, the property remains wholly unaffected by the alienation or by the contract entered into by such unauthorized person and the minor owner can ignore it as an absolute nullity, and consequently no liability to refund consideration can or ought to attach to, or be imposed upon, the minor, as a condition precedent to his recovering back his property from a person who is in possession without title: 30 Cal. 539; 38 Mad. 1071; 44 Bom. 175; A. I. R. 1921 Bom. 147, *Considered*: 18 All. 373, *not Foll.*

[P 293, C 1]

(c) *Mahomedan Law*—*De facto guardian*.

The transaction by a fazuli is incapable of ratification by the owner on attaining majority; A. I. R. 1918 P. C. 11, *Foll.* [P 293, C 2]

A. Razak Khan—for Appellants.

A. V. Khare—for Respondent 1.

Judgment.—This decision will dispose of the present appeal as also cross-objections preferred and first appeal No. 39-B of 1926 filed on behalf of Defendant 8. These appeals arise out of a suit instituted by the appellants in first appeal No. 48-B of 1926 under the following circumstances. The story of the original plaintiffs, who were brother and sister, was that the transaction by means of *rajinama* and *kabuliyat* dated 4th February 1901, whereby the field in suit was acquired in the name of their father Gulam Ahmed, was really the acquisition of their grandmother Mt. Jabandi; that she died in 1906 leaving behind three sons Gulam Ahmed, Gulam Abbas and Gulam Kasim, who inherited one-third each. That the two uncles Gulam Abbas and Gulam Kasim relinquished their respective shares orally and by writing respectively in July 1912 in favour of plaintiff Gulam Jafar. Exhibit P-2 dated 9th July 1912 is the deed of relinquishment executed by Gulam Kasim. Plaintiffs thus claimed their

father's one-third share by inheritance and their uncles' two-thirds by virtue of the aforesaid relinquishment. The plaintiffs' mother Mt. Rahmat Bi had before her death sold away the land in dispute to one Bashiruddin in May 1913. The plaintiffs question the binding character of the sale on the ground of want of benefit to them as minors and also on the ground that their mother was under Mahomedan Law disqualified from selling their property as she was not their legal guardian.

Defendants 1 and 2 are transferees from Bashiruddin and hence impleaded as parties. The claim was originally one for possession of land and for recovery of Rs. 15,000 as mesne profits. The trial Court decreed the claim for joint possession to the extent of five-eighth share subject to payment of Rs. 486-2-0 to defendant 1 and dismissed the rest of the claim. After the hearing of this suit was concluded, original plaintiff 2 Mt. Aminabi died and the judgment was delivered *nunc pro tunc* on 31st March 1926. Against the decision defendants 1 and 2 preferred first appeal No. 39-B of 1926 on 13th July 1926 and impleaded Gulam Jafar and Aminabi (though she was dead) as the respondents. The original plaintiff and the husband of Aminabi as her legal representative instituted their first appeal No. 48-B of 1926 on 24th July 1926.

At the hearing it was found out that first appeal No. 39-B of 1926 was incompetent so far as Aminabi was concerned, as there could be no appeal against a dead person, and consequently no substitution of a legal representative. The defendant-appellants, therefore, were permitted to press their appeal so far as Gulam Jafar was concerned and to prefer a cross-objection in first appeal No. 48-B of 1926 as against Aminabi's legal representative. The plaintiffs seek to get rid of the obligation to pay Rs. 486-2-0 and recover the three-eighth share which comprises the one-third share of Gulam Abbas orally relinquished and one-twenty-fourth share which Rahmatbi inherited from her husband Gulam Ahmed and asked for a decree of Rs. 5,000 on account of mesne profits. The object of the defendants' appeal and cross-objections is to have the claim dismissed in toto.

According to the defence Gulam

Ahmed was the real owner of the property in suit. He was not a benamidar for his mother Mt. Jebanbi as alleged by the plaintiffs. The first Court framed an issue on the point and found it in plaintiffs' favour. The correctness of this finding is challenged by the defendants, but I am not prepared to differ from the lower Court on this point, especially as the said finding is fully supported by a recital in Bashiruddin's own sale-deed that Gulam Abbas and Gulam Kasim owned a one-third share each in the land in suit. This admission of the rights of Gulam Abbas and Gulam Kasim is a very strong piece of evidence consistent with the theory of the plaintiffs' father being the benamidar for his mother Mt. Jebanbi. There is also a recital in the said sale-deed (Ex. D-15) that the two uncles had relinquished their shares in favour of their nephew, Gulam Jafar, and that Gulam Jafar was, therefore, the sole owner of the property conveyed. The present defendants being successors-in-interest of Bashiruddin are bound by the recitals and it would be for them to disprove their correctness. The evidence on record is hardly sufficient to disprove the recitals. I, therefore, confirm the first Court's decision that Gulam Ahmed was a benamidar for his mother Mt. Jebanbi.

The first Court found the relinquishment in writing by Gulam Kasim duly proved. It is evidenced by a registered deed, Ex. P-2. It, however, held that the oral relinquishment by Gulam Abbas is not proved and refused to draw the necessary inference from the recital in Ex. D-15, that he did so relinquish his interest in favour of his nephew Gulam Jafar. I do not think this decision of the Court below is correct. The Judge seems to have failed to notice that besides the recital about relinquishment there is a distinct assertion in the sale-deed that Gulam Abbas has attested the sale-deed in token of such relinquishment.

This was a very good piece of evidence to support the oral release by Gulam Abbas. Differing from the first Court I come to the conclusion that Gulam Abbas had orally relinquished his interest in favour of Gulam Jafar. By virtue of this release Gulam Jafar becomes entitled to recover his uncle Gulam Abbas's one-third share in the property, unless

the same was legally conveyed by his mother Mt. Rahmat Bi to Bashiruddin, and by the latter to defendants 1 and 2.

The lower Court has not decreed the recovery of Mt. Rahmat Bi's share to the plaintiffs. The appellants ask for a decree for the same in appeal on the ground that Mt. Rahmat Bi never purported to sell the property or any portion thereof as her own, and consequently her own interest therein could not and did not pass under the sale-deed and, therefore, devolved on the plaintiffs at her death. Exhibit D-15, which is a copy of sale-deed dated 13th July 1912 clearly shows that Mt. Rahmat Bi was a party to the document in her so-called capacity of the guardian of her minor son and purported to be executed only in that capacity. It does not appear either from the recitals or from evidence on record that she intended or contracted to transfer property in suit, or any portion thereof in her own individual right. The lower Court was, therefore, not justified in making the assumption it did, that Mt. Rahmat Bi was competent to sell her one-twenty-fourth share, and plaintiffs had no right to question it, and that the sale of that part of the field was, therefore, valid. There is absolutely no material to support this finding of the lower Court and it must be held that the interest of Mt. Rahmat Bi as heir to her husband was not sold, and consequently her interest devolved on her personal heir. Differing from the lower Court, I therefore hold that the appeal must succeed as regards Mt. Rahmat Bi's share.

The appellants dispute their liability to refund Rs. 486-2-0 to the defendants as a condition precedent to their obtaining possession of the property in suit. The validity of this direction to pay is challenged by plaintiff 1, principally on the ground that the sale is by a mother who, under Mahomedan Law is not the legal guardian of her minor son and, therefore, not duly authorized to alienate his property. In short, it is argued that if a void transaction is entered into, and consideration is paid thereunder to a person not entitled to receive it on behalf of the minor, not only is the transaction void ab initio but there is not even the liability on the minor owner of the property to refund what may have been received in his name by his so-called guardian. It is pointed out that

the lower Court failed to properly appreciate the distinction between the liability of a person, who is sui juris and another who is a minor and who acted for himself and a third who purports to act on behalf of a minor but without lawful authority, to refund the consideration received by him, as a condition precedent to the recovery, by any one of them, of property sold by him, or in his name by somebody else purporting to act for him. Reliance is placed on *Mohori Bibee v. Dharmodas Ghose* (1) in support of this contention. There a contract was made by a person who by reason of infancy was incompetent to contract, and it was held that the money-lender who advanced money to a minor on the security of the mortgage was not entitled to repayment of the money on a decree being made declaring the mortgage invalid. It was also held that Ss. 64 and 65, Contract Act were inapplicable to a case where there was not, and could not have been, any contract at all. The case of *Vaikunthram Pillai v. Authimoolam Chettiar* (2) was a case where a minor had received consideration under a mortgage executed by him during his minority, and it was held that, in the absence of any misrepresentation or fraud as to his age, he was not liable to a refund of the money received. That case has no application here. Similarly the case of *Gurushidaswami v. Parwara* (3) was a case of a minor suing to obtain a declaration that the sale-deed passed by her was not valid on the ground of her minority at the date of the sale; it was held that the alienee had no equity in his favour which would compel the plaintiff to restore the consideration money. In *Motilal Mansukhram v. Maneklal Dayabhai* (4) the Court declined to compel the defendant who was a minor either to restore the goods or to give its price on the ground that S. 65, Contract Act, starts on the basis of there being an agreement or contract between competent parties, and had no application to a case where there never was, and never could have been any contract.

(1) [1903] 30 Cal. 539=30 I. A. 114=7 C. W. N. 441=8 Sar. 374 (P. C.).

(2) [1915] 38 Mad. 1071=23 I. C. 799=26 M. L. J. 612.

(3) [1920] 44 Bom. 175=55 I. C. 271=22 Bom. L. R. 49.

(4) A. I. R. 1921 Bom. 147=45 Bom. 225.

It will thus be seen that all the cases relied on by the appellants being cases in which one of the parties to the transaction was himself a minor, no refund of consideration was ordered to be made by him, and the question, therefore, still remains whether the liability to refund consideration received by a person who is himself competent to contract, but who is disqualified from acting on behalf of a minor under the law applicable to the minor, can be said to attach to the minor who on attaining majority seeks to set aside the transaction on the ground that the alienation is wholly unauthorised. I think that in such a case the property remains wholly unaffected by the alienation or by the contract entered into by such unauthorized person and the minor owner can ignore it as an absolute nullity, and consequently no liability to refund consideration can or ought to attach to, or be imposed upon, the minor as a condition precedent to his recovering back his property from a person who is in possession without title. No doubt in *Nizam-ud-din Shah v. Andi Prasad* (5), there occurs an expression of opinion which, with due deference, I think is an obiter : it is to the effect that :

If the minor were to bring a suit to set aside the lease, we could, no doubt, in such a suit decline to grant him relief until he had made compensation to the mortgagee to the extent to which the minor or his property had benefitted by the money advanced on the security of the mortgage. The position is altered when the minor is a defendant and not a plaintiff.

There the mortgagee sued the minor for rent on the basis, of a lease which the minor owner's uncle had taken of the very property mortgaged by him on behalf of the minor, so that to enforce the lease was to practically enforce the mortgage against the minor and really no question of enforcing the equities had at all arisen there. In *Hyderman Kutti v. Syed Ali* (6), Abdur Rahim and Ayling, JJ., of the Madras High Court also made more or less similar observations at pages 518-19. Referring to the general principles of Mahomedan Law, deduced from the texts of Mahomedan Law, they observed at pages 523-24 as follows :

We may also point out here that according to the general principles of Mohamadan law, sale of a minor's property by an auauthorised guard-

ian even if it was not made for a valid cause, i. e., for necessity or in circumstances which would make the transaction purely advantageous to the minor, would strictly speaking be neither void nor voidable in the ordinary sense of the terms. An alienation of the minor's property without any justifying cause is regarded as *Manquf* or dependant, that is to say, its validity will depend upon the minor accepting the transaction on attaining majority. It cannot be said to be operative until it is avoided nor can it be said to be invalid unless and until it is ratified. It is a transaction in a state of suspense, its validity or invalidity is only determined by the minor adopting or not adopting it after he has attained majority though the effect of his decision will relate back to the date of inception of the transaction. If he accedes to adopt the transaction it becomes valid from the inception; otherwiss it will be treated as void and of no effect from the very commencement.

The law as regards the effect of dealings with a minor's property by a *de facto* guardian otherwise than in a case of absolute necessity or clear advantage to the minor is but a corollary of the general rule relating to sales by a person professing to deal with another's property, but without having legal authority so to do, i. e., by a *Fazuli* as he is technically called; such sales generally are treated as *Manquf* or dependent.

But their Lordships of the Privy Council while commenting on these observations, in a subsequent case reported in *Imambandi v. Mutsaddi* (7), have held that all dealings by an unauthorized person are absolutely void as the following important remarks at page 901 clearly indicate :

In their Lordships' opinion, the Hanafi doctrine relating to a sale by an auauthorised person remaining dependent on the sanction of the owner refers to a case where such owner is *sui juris*, possessed of the capacity to give the necessary sanction and to make the transaction operative. They do not find any reference in these doctrines relating to *fazuli* sales so far as they appear in the *Hedaya* or the *Fatawal Alamgiri*, to dealings with the property of minors by persons who happen to have charge of the infants and their property in other words, the '*de facto* guardians.'

The Hanafi doctrine about *fazuli* sales appear clearly to be based on the analogy of an agent who acts in a particular matter without authority, but whose act is subsequently adopted or ratified by the principal which has the effect of validating it from its inception. The idea of agency in relation to an infant is as foreign, their Lordships conceive, to Mahomedan Law as to every other system.

It, therefore, follows that the transaction by a *fazuli* is incapable of ratification by the owner on attaining majority. As the transaction does not amount to a contract or to a transfer, and creates no rights in the so called transferee, it creates

(7) A. I. R. 1918 P.C. 11=45 Cal. 873=45 I.A. 73 (P.C.).

(5) [1896] 18 All. 373=1896 A.W.N. 99,

(6) [1912] 37 Mad. 514=23 M.L.J. 244=15 I.C. 576=1912 M.W.N. 889.

no corresponding equities or liabilities on the part of minor owner to refund what his unauthorized guardian may have received by way of consideration in his name. The result, therefore, is that the minor owner is legally competent to recover back his property from the person possessing it without title, without any payment. The direction of the lower Court for payment is, therefore, incompetent and must be set aside. I, therefore, hold that the plaintiffs can claim back this property without being called upon to refund anything to the defendant-appellant.

It follows that since plaintiffs are entitled to eject the defendants as trespassers, they can recover mesne profits also from them. The direction to set off interest against profits is out of place. The extent of mesne profits must be ascertained in the Court below but the total relief to be granted under this head cannot exceed the amount at which it is valued in appeal namely Rs. 5000.

The above decision disposes of also the points raised in the cross-appeal and objection. Plaintiffs' appeal is allowed with costs, whereas the defendant No. 1's appeal and cross-objection are disallowed with costs.

R.K. *Plaintiff's Appeal allowed.*
Defendants' appeal dismissed.

A. I. R. 1927 Nagpur 294

FINDLAY, J. C.

Balaji Kashinath—Judgment-debtor—Applicant.

v.

R. B. Anandrao—Decree-holder—Non-Applicant.

Civil Revision No. 35 of 1927, Decided on 21st March 1927, from the order of the Addl. Dist. J., Nagpur D/- 26th November 1924, in Civil Suit No. 14 of 1915.

Civil P. C., O. 21, R. 95—Decree-holder, auction purchaser—Application under the rule is governed by Art. 182, Limitation Act—Civil P. C., S. 47—Limitation Act, Art. 182.

An order on an application under O. 21, R. 95, by an auction-purchaser who is also decree-holder, is an order under S. 47, Civil P. C. The application is governed by the limitation laid down in Art. 182 and not by Art. 180.

[P 295 C 1]

Where the auction-purchaser is the decree-holder himself and he presents an application or possession, he occupies therein, in reality, a dual position. He is, from one point of view the auction-purchaser applying to be put in possession of his property, while from another point of view he is the decree-holder claiming to have his decree fully satisfied by having, so to speak, the proceeds of the decree made over to him: *A. I. R. 1926 Cal. 798 (F. B.)*; 41 *All. 479*; 35 *Bom. 452*; 28 *Mad. 87* and 31 *Cal. 737, Foll.* [P 295 C 1]

S. R. Mangrulkar—for Applicant.

M. R. Indurkar—for Non-Applicant.

Order.—In this case the non-applicant was the decree-holder and, at the Court sale held on 10th March 1922, he became the auction-purchaser of the property. The first application for possession was filed on 25th October 1922, but eventually this application was withdrawn on 20th March 1924. The present application for recovery of possession was filed on 19th September 1925, and the present applicant's contention is that the second application for possession was barred inasmuch as it was made more than three years from the confirmation of sale: vide Art. 180 of the Schedule to the Limitation Act. Reliance in this connexion has been placed on the decisions contained in *Sultan Sahib Marakayar v. Chidambaram Chettiar* (1), *Sasi Bhusan Mookerjee v. Radha Nath Bose* (2), *Bhagwati v. Banwari Lal* (3), and *Kamal Nain Singh v. Kesho Prasad Singh* (4).

The question whether such an application is to be regarded as a step in execution of the decree, or as an application of the kind contemplated in Art. 180 referred to above, has been the subject of much judicial interpretation and it is noticeable that, even in the Full Bench case of the Allahabad High Court quoted above, the learned Chief Justice and one Justice dissented from the view taken by their brothers.

For my own part, I prefer to follow the view taken in *Babu Ram v. Piari Lal* (5), *Sandhu Taragnar v. Hussain Sahib* (6), *Sadashiv v. Narayan Vithal*

(1) [1909] 32 *Mad. 136*=1 *I. C. 998*=19 *M. L. J. 224*.

(2) [1914] 19 *C. W. N. 835*=25 *I. C. 267*=20 *C. L. J. 433*.

(3) [1909] 31 *All. 82*=1 *I. C. 416*=6 *A. L. J. 71 (F. B.)*.

(4) *A. I. R. 1922 Patna 310*=1 *Pat. 701*.

(5) [1919] 41 *All. 479*=50 *I. C. 143*=17 *A. L. J. 496*.

(6) [1904] 28 *Mad. 87*=14 *M. L. J. 474*.

Mawal (7), and *Ram Narain Sahoo v. Bandi Pershad* (8). If we go down to first principles, is it impossible to hold, in the circumstances of the present case, that on the day of the confirmation of the sale the decree was then satisfied once and for all? I am of opinion that a decree cannot be said to be satisfied until the decree-holder has applied to the Court to be paid the purchase price and has been paid it. In the present instance he applied to the Court to be put in possession of that which represents the money in question, viz. the house itself. In a sense it seems to me that the auction-purchaser being the decree-holder himself, who presented an application for possession like the one we are concerned with, occupies therein in reality a dual position. He is from one point of view the auction-purchaser applying to be put in possession of his property, while from another point of view he is the decree-holder claiming to have his decree fully satisfied by having, so to speak, the proceeds of the decree made over to him. Even, therefore, from this point of view there can be no question: but that such an application as we are concerned with would, in the circumstances, be governed by the limitation laid down in Art. 182, of the Schedule to the Limitation Act. I, therefore, in this matter prefer to follow the view taken by the Allahabad High Court Bench in *Babu Ram v. Piari Lal* (5), quoted above, as well as in *Sadashiv v. Narayan Vithal* (7).

The point at issue has recently been considered most exhaustively by a Full Bench of five Judges of the Calcutta High Court in *Kailash Chandra Tarapdar v. Gopal Chandra Poddar* (9). The majority of the Judges, with only a single dissentient, were of opinion that an order on an application under O. 21, R. 95, Civil P.C., by an auction-purchaser who is also decree-holder, is an order under S. 47, Civil P.C. The reasoning of the majority of the Judges is in my opinion conclusive on the point: the execution sale was no doubt confirmed, but the sale cannot be said to be complete until possession is conferred upon the decree-holder who was auction-

purchaser in this case. It is noticeable that Cuming, J., the dissenting Judge, rested his view on two considerations: (1) that the auction-purchaser, even although decree-holder, is not a party to the suit; and (2), that an application under O. 21, R. 95, is not a matter relating to the execution, discharge or satisfaction of the decree. With all deference I am unable to understand why the decree-holder ceases to be a party to the suit merely because the sale has been confirmed and it would be, in my opinion, anomalous to refuse to recognize his real position solely because he has himself purchased property sold in execution of his decree. On the second point I am unable to see any good grounds for holding that a decision in proceedings relating to delivery of possession is not a question relating to the satisfaction of the decree.

I am, therefore, of opinion that the order of the Additional District Judge, dated 26th November 1926, is correct and I dismiss the present application for revision. Applicant must bear the non-applicant's costs. Costs in the lower Court as already ordered. I fix Rs. 40 as pleader's fees.

R.K.

Application dismissed.

A. I. R. 1927 Nagpur 295

HALLIFAX, A. J. C.

Seth Misrilal—Plaintiff—Appellant.

v.

Bhimrao and another—Defendants—Respondents.

Second Appeal No. 300 of 1926, Decided on 22nd March 1927, from the decree of the Dist. J., Hoshangabad, D/- 11th March 1926, in Civil Appeal No. 185 of 1925.

(a) *Transfer of Property Act, S. 52—Lease of mortgaged property pending suit on mortgage if not affecting mortgagee's right under decree is not affected.*

Where during the pendency of a suit on mortgage of the proprietary right in a field a lease of the land was granted in good faith, and with no intention of affecting the rights the mortgagees would acquire if they obtained a final decree for foreclosure:

Held: that as the lease did not affect the mortgagee's right S. 52 did not affect the question.

[P 296 C 1]

(7) [1911] 35 Bom. 452=11 I. C. 987=13 Bom. L. R. 661.

(8) [1904] 31 Cal. 737.

(9) A. I. R. 1926 Cal. 793=53 Cal. 781 (F.B.).

(b) *Transfer of Property Act, S. 53—Lease of mortgaged property pending suit, if granted with intention to deprive mortgagee of property, would be voidable.*

If a lease has been granted of the mortgaged property with the intention of depriving the mortgagee of a part of the property he was to get, it would be liable to be set aside under S. 53.

[P 296 C 2]

N. G. Bose—for Appellant.

V. Bose—for Respondents.

Judgment.—It was admitted by both sides that the lease of the land in dispute was granted in good faith, and with no intention of affecting the rights, the mortgagees would acquire if they obtained a final decree for foreclosure. This is more apparent from the fact that the preliminary decree for Rs. 1,400 and Rs. 447-14-0 as costs, was not obtained on the mortgage for Rs. 3,300 only. That and a previous mortgage for Rs. 1,300 were amalgamated on the 23rd of July 1904 in a fresh mortgage for Rs. 5,400 payable with interest in nine equal annual instalments of Rs. 500 and a tenth of Rs. 900, of which the first eight were duly paid. That adds to the certainty that in November 1917, when the lease was granted the mortgagors had by no means lost hope of redeeming the property.

But it is no longer contended that the lease is of such a nature that it would not have been granted if the lessor had known or expected that he was to continue indefinitely to be owner of the property. It is now pleaded that S. 52, Transfer of Property Act, forbids any lease of mortgaged property during the pendency of a suit on the mortgage, except under the authority of the Court. If that were the law it would create an impossible situation, though that would be no reason for refusing to follow it. But it is not. What was mortgaged was the proprietary right only in the field in dispute, and that the plaintiff has got. His rights under the decree have therefore not been affected.

The right to have a lease of this kind set aside arises out of fraud in granting it and is stated in S. 53, Transfer of Property Act; S. 52 of the Act has nothing to do with it. If a man contracted to sell his village, and, between the contract and the sale, leased out all his khudkasht land to his relations for inadequate consideration, the buyer could get the leases set aside. It is the same

right that the mortgagee would have here if the lease had been granted with the idea that foreclosure was inevitable and with the intention of depriving him of a part of the property he was to get. That, however, is not because the mortgage suit was pending at the time, for if it were, the buyer in the other case would not have the right.

The appeal will be dismissed and the appellant must pay all the costs of both parties in all three Courts.

D.D.

Appeal dismissed.

A. I. R. 1927 Nagpur 296

MACNAIR, A. J. C.

Ramchandra—Plaintiff—Appellant.

v.

Rupchand and others—Defendants—Respondents.

S. A. No. 405-B of 1925, Decided on 12th April 1927, from the decree of the 1st Addl. Dist. J., Akola, D/- 6th October 1925, in Civil Appeal No. 118 of 1925.

(a) *Berar Land Revenue Code, 1896, S. 211—Allahabad rulings have no application to the Code.*

The decisions of the Allahabad High Court have little bearing on the interpretation of the provisions of the Berar Land Revenue Code, as there is no provision in the Code corresponding to S. 20, Agra Pre-emption Act. [P 297, C 1]

(b) *Berar Land Revenue Code, S. 211—Vendee becoming a sharer before suit—The right of pre-emption is not lost.*

A co-occupant has a subsisting right of pre-emption even if the stranger purchaser becomes a co-sharer in the property before the date of suit. There is nothing in the Code which indicates that the plaintiff loses his right when the vendee subsequently becomes co-occupant. [P 298, C 1]

Atmaram Bhagwant and S. A. Ghadgay—for Appellant.

M. B. Niyogi—for Respondents.

Judgment.—The plaintiff Ramchand brought a suit for pre-emption with regard to one acre out of Survey No. 1, 10 pot hissa 1, of mauza Chaware. Daulat, defendant 3, had sold this one acre to the other defendants. The suit was brought under the provisions of S. 211, Berar Land Revenue Code, 1896.

Three defences were put forward. The first was that plaintiff had been offered the field and he declined to buy.

The next refers to the market price. The third was that the defendants had become co-occupants before the suit was filed. There are findings of fact in favour of the plaintiff with regard to the first two defences, and these findings were not attacked before me.

The facts found with regard to the third defence are as follows: A decree was obtained against Mt. Bani, the widow of Balkishen a co-sharer in field No. 10 pot hissa 1. On this decree the share could have been validly attached and sold, but before execution, Mt. Bani remarried and lost her rights in this share. In the execution proceedings, Mt. Bani was impleaded as legal representative. The share was sold and was purchased by the defendants. At the date of the suit then the defendants had a title to a share in the field, but this title was open to attack by the legal representatives of Balkishen.

The first Court held that the defendants could not be considered as co-sharers on the date when the suit was filed. The lower appellate Court held that the plaintiff had no right to impeach the auction sale or to question the title of the auction-purchasers, and for this reason the defendants must be considered to have enjoyed the auctioned share as co-occupants of the property when the present suit was filed. The lower appellate Court held that the plaintiff had to prove that a right of pre-emption exists not only at the date of the sale, but also at the time when the pre-emptive suit was filed. As the defendants were co-occupants, at the latter date, the suit was dismissed. The plaintiff appeals.

On ground 5, it is urged that the plaintiff's suit is based on the specific provisions contained in Chap. 18, Berar Land Revenue Code and that according to these provisions, the plaintiff still retains his right of pre-emption even if the defendants become co-occupants before he files the suit. I consider that the appellant's pleader is correct in saying that the decisions of the Allahabad High Court have little bearing on the interpretation of the provisions of the Berar Land Revenue Code. The Allahabad High Court was really concerned to discover what the custom regarding pre-emption was. The provisions in the *wajib-ul-arz* of

a village will seldom be exhaustive or provide for exceptional cases. The learned Judges of the Allahabad High Court were clearly at liberty to come to the conclusion that it would not in reality be in accordance with this custom to allow a co-sharer to obtain a decree for pre-emption unless at the date of the decree he was still a co-sharer and the original vendors were still strangers: as I shall point out the conclusion to which they did come is not so general as this. I understand that Drake-Brockman, J. C., took the view I have taken in *Mt. Raijai v. Irbhan* (1). On page 140 he states that the principle on which certain Allahabad decisions proceed is applicable to cases under the Berar Code. But he concedes the correctness of Mr. Stanyon's proposition that the Code should be treated as exhaustive on the matters in respect of which it declares the law.

Now, a careful consideration of the Allahabad rulings shows that they do not really support the view taken by the first appellate Court. In *Seri Mal v. Hukam Singh* (2), the head-note is as follows:

In cases of pre-emption based upon a *wajib-ul-arz* the right of pre-emption does not survive, if the land, which is subject to pre-emption having been sold to a stranger, is subsequently resold by the stranger vendee before suit to a co-sharer having equal rights with those seeking pre-emption.

The ratio decidendi appears clear. One co-sharer files a suit for pre-emption and another instead of filing a suit takes a sale-deed from the vendee. For practical purposes the right of pre-emption has been exercised. In this connexion S. 209 (2), Berar Land Revenue Code may be noted. Where two or more co-occupants are equally entitled to the right, the matter must be determined by lot. When there is no better method of determining which of two persons shall pre-empt a plot, it seems proper that when one of these persons has been able to exercise his right without recourse to a suit, the other should not be allowed to sue. Similarly in *Bhagwan Das v. Mohan Lal* (3), the decision is that a purchaser originally a stranger, who, by a separate

(1) [1909] 5 N. L. R. 136=3 I. C. 923.

(2) [1898] 20 All. 100=(1898) A. W. N. 216.

(3) [1903] 25 All. 421=(1903) A. W. N. 83.

transaction becomes a co-sharer, cannot be ousted

by any co-sharer not having superior pre-emptive rights to himself.

Now in the present suit, it is admitted that the plaintiff, a brother of the vendor-defendant, had under S. 209, Berar Land Revenue Code a prior right to pre-empt. It is thus clear that the ratio decidendi of the cases I have cited does not apply to the case I am considering.

The provisions of the Agra Pre-emption Act, 1922 appear to have been founded on the rulings of the Allahabad High Court. S. 19 of the Act states :

No decree for pre-emption shall be passed in favour of any person unless he has a subsisting right of pre-emption at the time of the decree, and S. 20 is as follows :

No suit for pre-emption shall lie where the purchaser has, prior to the institution of such suit, transferred the property in dispute to a person having a right of pre-emption equal or superior to that of the plaintiff, or has acquired an indefeasible interest in the mahal which if existing at the date of the sale of foreclosure, would have barred the suit.

This clearly indicates that a plaintiff is considered to have a subsisting right of pre-emption even if the stranger purchaser has become a co-sharer; otherwise S. 20 would have been unnecessary.

I proceed to consider to what extent the Berar Land Revenue Code has declared the law which is to be applied to the present case. Under Ss. 205 and 210 the plaintiff obtained a right of pre-emption when his brother sold one acre to the other defendants who were not already co-occupants in the survey number. The code might have stated that this right of pre-emption would cease if the vendees subsequently became co-occupants in the survey number, but it does not, although S. 210 contains the words "already a co-occupant."

I can find nothing in the code which indicates that the plaintiff lost his right when the vendees subsequently became co-occupants. I remark that a provision of this nature would render it easy to nullify the provisions of the code. The vendees bought one acre. They might have followed this up by buying 1/10 or 1/100th of an acre at intervals. Whenever a suit for pre-emption was filed the defendants could plead a subsequent purchase before the suit was instituted. When pre-emption

with regard to the subsequent purchase was claimed the defendants, in addition to reliance on legal difficulties could plead still another purchase.

The Agra Pre-emption Act contains special provisions dealing with a subsequent purchase of a share by the person against whom pre-emption is claimed. It is sufficient to say that the Berar Land Revenue Code contains no provision corresponding to S. 20, Agra Pre-emption Act. That Act assumes that, but for these special provisions a plaintiff would have a subsisting right to pre-emption against a vendee who subsequently acquires a share: it avoids the difficulty which I have pointed out by insisting that the right acquired must be indefeasible, that is, I understand, one in respect of which a suit for pre-emption could not be brought.

It is unnecessary for me to decide whether the decision in *Bhagwan Das v. Mohanlal* (3) would apply to a suit under the Berar Land Revenue Code. That decision would not help the respondents since at the date of the suit the plaintiff had a superior pre-emptive right to the defendants. It is sufficient for me to say that in the absence of any provision in the Berar Land Revenue Code corresponding to S. 20, Agra Pre-emption Act, the plaintiff appears to have a right under the provisions of the Code to pre-empt the defendants even assuming that the defendants at the date of the suit are co-sharers with indefeasible inferior pre-emptive rights.

I mention that S. 211 says that every co-occupant having a right of pre-emption may bring a suit. I concede that the right of pre-emption must exist when the suit is brought, but I find no reason to hold that the right of pre-emption ceased when a stranger-vendee, as in this case, became a co-sharer. The appeal, therefore, succeeds. The decree of the lower appellate Court will be set aside and the decree of the first Court will be restored. Costs in all Courts will be borne by the defendants-respondents.

R.K.

Appeal allowed..

A. I. R. 1927 Nagpur 299

FINDLAY, J. C.

Maroti Rao—Plaintiff—Appellant.

v.

Mt. Tulsi Bai—Defendant—Respondent.

S. A. No. 588 of 1925, Decided on 1st April 1927, from the judgment of the Dist. Judge, Nagpur, D/- 19th December 1925, in Civil Appeal No. 161 of 1925.

(a) *Civil P. C., O. 1, R. 10—Mortgage suit—Preliminary decree passed—Lessee of mortgagor before final decree need not be joined.*

Although under O. 1, R. 10, Civil P. C., a party may be joined at any stage of the proceedings, and the proceedings in a mortgage suit necessarily last until decree absolute is passed, there is no necessity for the joining by the plaintiff, in the mortgage suit, the lessee of the mortgaged property after preliminary decree.

[P 299, C 2]

(b) *Transfer of Property Act, S. 52—Lease.*

The doctrine of *lis pendens* applies to agricultural leases: 14 N. L. R. 133, *Foll.* [P 299, C 2]

V. R. Pandit and *M. R. Bobde*—for Appellant.

K. P. Vaidya—for Respondent.

Judgment.—The facts of this case are sufficiently clear from the lower Courts' judgments. The question for decision is whether the patta or lease, dated 9th November 1918, granted by the mortgagor Ganpatrao in favour of the plaintiff-appellant in respect of field No. 23 in mauza Pilladol was valid or not. Admittedly, a preliminary decree in the suit had been passed on 7th October 1916 (cf. Exh. D. 1), while the final decree for foreclosure was passed on 30th October 1922. It was in the meantime, therefore, that the lease in question (Ex. P. 14) was executed. Equally clearly also these fields with cultivating rights therein were included in both the decrees. It has been urged on behalf of the plaintiff-appellant that, under the terms of the preliminary decree, the debt was payable by 32 instalments (yearly ones) and that foreclosure was only going to ensue when three instalments had been defaulted, and it has been pointed out that the lease we are concerned with was given before the three such defaults could have occurred.

There has been some discussion in this Court as to whether the new number 23 corresponds to the old number 30 or 31. I cannot, however, find any reason for disturbing the finding of the learned

District Judge on this point and Ganpatrao's own evidence as P. W. 5 practically establishes the fact that the old number was 30 and not 31.

The main contention urged on behalf of the plaintiff-appellant is that he should have been joined by the present defendant-respondent as a defendant in the mortgage suit, even after the preliminary decree had been passed, as, being a person interested in the mortgaged property, he could claim a right to redeem. The respondent not having done this, it has been urged in this Court that the present plaintiff-appellant is entitled to go behind the mortgage decree and question even the fact whether the field in suit was included in the said decree. Although under O. 1, R. 10, Civil P. C., a party may be joined at any stage of the proceedings, and the proceedings in a mortgage suit necessarily last until decree absolute is passed, I do not think there was in the present case any necessity for the joining by the plaintiff in the mortgage suit of the present defendant merely because in the meantime he had become a lessee of the mortgagor. On the contrary, if the present appellant had wanted to exercise the right of redemption, it was incumbent on him to have applied therefor to the Court. I fully agree, therefore, with the learned District Judge in his finding that the foreclosure decrees are so far conclusive against the plaintiff, he having derived his title from the mortgagor after the preliminary decree had been passed in the case.

It has been pointed out, however, on behalf of the appellant that under S. 66, Transfer of Property Act, the mortgagor being the beneficial owner of the property is not liable to the mortgagee for permissive waste, but must not commit active waste so as to render the security insufficient. The decision of Batten, A. J. C., in *Shri Ganesh v. Pandurang* (1) would, no doubt, be sufficient authority for holding that the doctrine of *lis pendens* applies to the case, but, apart from this, the present case is, in reality, a much stronger one in favour of the respondent than were the decisions in *Dhiraj Singh v. Dinanath* (2), and in *Annamalai Chettiar v. Malayandi*

(1) [1918] 14 N. L. R. 133=46 I. C. 762.

(2) [1910] 6 N. L. R. 140=8 I. C. 288.

Appaya Naik (3), because in the present case the cultivating rights in *sir* were specifically included in the mortgage decree. At the same time, as I have already pointed out, final decree for foreclosure could not have been passed until three years had elapsed from Baisakh Sudi 15 in the fasli year 1326, and there, therefore, remains the question whether the grant of this lease to the present appellant was an ordinary and reasonable incident of intermittent beneficial enjoyment of the property; in other words, was the grant of this lease a prudent transaction carried through by the mortgagor-malguzar in the ordinary course of management, or was it a transaction intended to diminish the security of the mortgagee? As this point has not been decided by the Judge of the lower appellate Court and as various matters of evidence are involved therein, I remand the case under O. 41, R. 25, Civil P. C., to the lower appellate Court for the trial of the above issue. The lower appellate Court should submit its finding together with the evidence to this Court by 27th October 1927. Thereafter, ten days will be allowed for the filing of objections and the appeal will be finally heard on 7th November 1927.

R. K.

Case remanded.

(3) [1906] 29 Mad. 426=16 M. L. J. 372 (F. B.).

A. I. R. 1927 Nagpur 300

MACNAIR, A. J. C.

Mohmad Abdul Rahim—Decree-holder—Appellant.

v.

Parashram and others—Judgment-debtors—Respondents.

F. A. Nos. 7-B and 8-B of 1925, Decided on 17th June 1927, from an order of the 1st Addl. Dist. Judge, Akola, D/- 8th December 1924.

(a) *Civil P. C., O. 21, R. 100*—No declaratory order can be passed under the rule.

The Code makes no provision for passing a declaratory order on an application under O. 21, R. 100. The only order which can be passed in favour of the applicant is a direction that the applicant be put in possession of the property in dispute. [P 301 C 1]

(b) *Civil P. C., S. 53*—Collector can deliver standing crops.

The Collector has power to deliver possession

of the standing crops. The Collector when partitioning the estate in accordance with S. 53, Civil P. C., has power to give the shares to the respective allottees and he can also place them in possession of the crops attached to the land.

[P 301 C 2]

V. Bose and B. K. Bose—for Appellants.

Fida Hussain and J. Sen—for Respondents.

Judgment.—The judgment in this appeal will govern the disposal of F. A. No. 8-B of 1925, *Mahomed Abdul Rahim v. Narain*, as these two appeals have been argued together before me. The way in which the matter has been treated by the lower Court has rendered the position of the parties complicated. A decree for partition was transferred to the Collector and he divided certain fields allotting one-third share to Mt. Jahurunnissa Begum, the judgment-debtor, and two-thirds share to Abdul Rahim, the decree-holder. Narain held possession of three of the fields and Parashram of the remaining two as tenants of Jahurunnissa Begum. On the application of Abdul Rahim, the Collector gave him possession of two-thirds share of this field with the standing crops. The tenants applied for restoration of possession and return of the crops. They urged that the leases had been granted before the partition suit commenced and their applications were clearly made under O. 21, R. 100, Civil P. C.

Mr. Pande, the Judge who dealt with those applications, did not decide whether the lease has been granted before the date of the partition suit or not. He held that the Collector had no jurisdiction to pass any order regarding the standing crops. He dismissed the applications for restoration of possession but passed an order that the applicants were entitled to the crop of the fields or the price thereof.

This order was objectionable for several reasons. The Judge did not indicate under what provision of the law he passed the order regarding the crops. It was necessary for him to decide whether the applicants as they stated held under a title given to them before the partition suit commenced. If he held that they were, he had to consider an application made under O. 21, R. 100, Civil P. C., and any order passed by him under O. 21, R. 101, could be challenged by the institution of a suit under O. 21, R. 103. If

he held that the applicants were representatives of the judgment-debtor, any order passed by him would be a decision of the question between the parties to the suit and would be subject to appeal. In the next place the Code makes no provision for passing a declaratory order on an application under O. 21, R. 100. The only order which can be passed in favour of the applicant is a direction that the applicant be put in possession of the property in dispute. If the application was treated as raising a question under S. 47, Civil P. C., the Court was bound to decide all questions raised and should have determined the value of the crops. A declaratory order that the applicant is entitled to certain relief is not a final decision, where the Court has power to grant the relief. It is difficult to imagine what the learned Judge imagined the effect of his order to be. Were the applicants to make further applications to him in order to recover the crops or their value or were they to file separate suits or did he expect the non-applicant to file suits challenging the declaratory order?

The finding of the learned Judge regarding the award of the Collector appears to be incorrect but this could have been set right had it been made clear under what provisions of the law the order was passed and how persons aggrieved by that order could challenge it. The applicants subsequently made applications for recovery of the value of the standing crops. The learned Judge who considered these applications treated them as requests that the Court should exercise its inherent powers under S. 151, Civil P. C. It was held that the non-applicant could not question the former decision that the applicants had a right to claim the value of the crops. Evidence was taken regarding this value and decrees were passed directing the applicant to pay certain sums.

This order has been passed on the assumption that the question decided may be one arising between the parties to the suit. It appears to me then that an appeal lies. The respondents have not urged that no appeal lies. I remark that if no appeal lay, I shall have to treat the memoranda of appeal as applications for revision.

It is first urged that the order of Mr.

Pande could not preclude the appellant from urging that he had been given possession of the standing crops in a legal manner. As I have pointed out O. 21, R. 101 does not authorize such an order and there was no necessity for the appellant to institute a suit in accordance with O. 21, R. 103. Again the order is not a final disposal of the respondents' claims. Clearly a final disposal of these claims involved the determination of the value of the crops and the direction that the respondents should be put in possession of the crops or receive their value. In my opinion then the order of Mr. Pande cannot be treated as a final order binding the parties to this appeal.

It is next urged that the Collector had power to deliver possession of the standing crops. This contention appears correct. The Collector, when partitioning the estate in accordance with S. 53, Civil P. C., has power to give the shares to the respective allottees: *Parbhudas Lakhmidas v. Shankarbhai* (1). As stated in *Narbadapuri v. Bholanath Kasturchand* (2), whatever is fixed to the soil becomes in the eye of the law a part of it. If the Collector could place the appellant in possession of the land, he could also place him in possession of the crops attached to the land.

It appears to me that the subsequent applications of the respondents must be considered as a continuation of the application to Mr. Pande. The appellant accedes to this view. The respondents have all along claimed that they were not representatives of the judgment-debtor. The point to consider is whether if their contention is correct, S. 151, Civil P. C., can be invoked. In my opinion it cannot. The Code contemplates a summary order which may be disputed in a subsequent civil suit on such applications. Now that the crops are not in existence a summary order does not seem desirable. S. 151 cannot be invoked in order to give them a final order which would not presumably be even subject to appeal; it appears dangerous and useless to invoke S. 151 in order to enable an order directing payment of money to be passed, if the intention is that the order is only a summary one, liable to challenge by a suit.

(1) [1887] 11 Bom. 662.

(2) [1902] 15 C. P. L. R. 141.

The law appears to me to provide adequate remedy for the respondent-applicants. They can file a suit for damages. S. 14, Limitation Act, will in my opinion apply to such a suit.

I, therefore, set aside the orders passed by the lower Court. The applications for summary remedy will be dismissed. As the proceedings with regard to these applications were instituted in consequence of an unfortunate order passed by the Court, the parties will bear their own costs in this Court and in the lower Court so far as the costs mentioned in the order dated 8th December 1924, are concerned.

R.K.

Orders set aside.

* A. I. R. 1927 Nagpur 302

HALLIFAX, A. J. C.

Zaki-ul-Din and others — Plaintiffs—Appellants.

v.

Chunnilal and others — Defendants—Respondents.

S. A. No. 365 of 1926, Decided on 30th April 1927, from the decree of the Dist. J., Hoshangabad, D/- 23rd February 1926, in Civil Appeal No. 60 of 1926.

(a) *Civil P. C., O. 31, R. 8* — Final decree should be for mortgage amount minus excess profits.

In a suit for redemption and profits from the date of the deposit it is the duty of the Court to ascertain what those profits are and to pass a final decree for redemption on payment to the mortgagees of the mortgage amount in deposit minus the amount of those profits. [P 302 C 2]

(b) *Civil P. C., O. 2, R. 2*—Claim for profits since deposit must be joined in redemption suit.

Mortgagors are bound to include a claim for excess profits from the date of their deposit of mortgage money in their redemption suit.

[P 303 C 1]

* (c) *Civil P. C., O. 23, R. 1* — Court can pass an order of its own motion.

The rule contemplates the passing of an order by the Court on its own motion and an application by plaintiff is not necessary. [P 303 C 1]

* (d) *Limitation Act, Art. 148*—A suit for surplus profits is a part of redemption suit and Art. 148 and not Art. 105 applies—*Limitation Act, Art. 105*.

A suit for surplus profits is a part of the redemption suit and based on the same cause of action and ought to be tried in the redemption suit. An order by the Judge that it should be tried separately does not alter its nature nor

that of the cause of action on which it is based, and limitation is governed by Art. 148, and not by Art. 105. [P 303 C 2]

S. B. Gokhale—for Appellants.

N. G. Bose—for Respondents.

Judgment.—All references to the various intermediate transfers of interest that took place may well be omitted as irrelevant. Without them the facts are these. The plaintiffs mortgaged a village with the defendants for Rs. 1,500, agreeing that the defendants should hold possession in lieu of interest, and the mortgage should be redeemed on payment of the Rs. 1,500. The mortgagees were in possession when the mortgagors deposited Rs. 1,500 in Court on the 25th March 1918, in satisfaction of the mortgage. This tender was refused, and the mortgagors accordingly filed a suit for redemption, in which it was apparently held that the payment of Rs. 1,500 on the 25th March 1918, had redeemed the mortgage. Nevertheless a preliminary decree was issued on the 21st May 1920, allowing six months for redemption, and a final decree declaring the mortgage redeemed was passed on the 25th of January 1921. The mortgagors were formally put in possession by the Court on the 23rd February 1921.

The want of thought and care revealed by this meaningless procedure had appeared before even the preliminary decree was passed. In their plaint the mortgagors claimed such profits as the mortgagees had made out of the village after the date on which they had refused to allow redemption on payment of Rs. 15,00, that is the 25th March 1918. It was then the duty of the Court to ascertain what those profits were and to pass a final decree for redemption on payment to the mortgagees of the Rs. 1,500 in deposit minus the amount of those profits. Instead of doing that the learned Judge said at the end of his judgment :

Plaintiff is given permission to file another suit for his surplus profits if any.

In accordance with this the mortgagors on the 11th of January 1924, filed the suit out of which this appeal arises claiming the profits made by the defendants during their wrongful possession from March 1918, when they deposited the Rs. 1,500 in Court, to February 1921, when they were formally put in possession of the village in execution.

In the first Court it was found that the profits of each of the first two of the three years amounted to Rs. 600, and that the defendants were not liable to pay those of the third year, because the plaintiffs had actually taken possession of the village shortly after the passing of the meaningless preliminary decree for redemption in May 1920, and had themselves realized the profits of that third year, though they had gone through the formality of getting themselves put in possession by the Court in February, 1921. They contest the correctness of this last finding in this Court, which it is open to them to do, as there is no decision on the point in the judgment of the lower appellate Court. But the evidence against them is overwhelming, consisting mainly of the statements of their own witnesses, and it is now found on that evidence that they took possession of the mortgaged property in or about June, 1920.

Their suit was dismissed in appeal on the ground that the order in the redemption suit, which is correctly regarded as one passed under R. 1, O. 23, Civil P. C., was in excess of the powers of the Court. The reason for this view is hard, if not impossible, to discover in the very confused judgment of the lower appellate Court. Many rulings are cited in support of the proposition, which is discussed at length, that the plaintiffs were bound to include a claim for excess profits in their redemption suit. But nobody could doubt that, and in fact they did.

There is some indication of the reason for the view of the Court having no jurisdiction to pass an order under R. 1, O. 23, being the fact that the plaintiffs never applied for such an order. But there is nothing about any such application in the rule mentioned, which clearly contemplates the passing of an order by the Court on its own motion. It is certainly most unlikely that a Court would ever do this, but it is therefore equally unlikely that there was no application in this case.

Apart from that the reasoning, as far as can be seen, seems to be this. The plaintiffs were bound by law to include the claim for surplus profits in that suit, and therefore could not withdraw it, even with the permission of the Court. But R. 1, O. 23 says they could, and any-

how it is hard to see how any part of the claim in a suit could be withdrawn, with permission to put it forward again on the same cause of action, unless it had been properly put forward in that suit. The order ought not to have been passed, but it is a perfectly legal order and gave the plaintiffs the right to sue for the surplus profits in a separate suit.

It has also been held that the claim is time barred as limitation is governed by Art. 105 of the schedule of the Limitation Act. That provides a period of three years from the time when the mortgagor re-enters on the mortgaged property for a suit by a mortgagor, after the mortgage has been satisfied, to recover surplus collections received by the mortgagee; the mortgagors re-entered in 1920 and the suit was filed in January 1924. But the suit is a part of the redemption suit and based on the same cause of action. It ought to have been tried in that redemption suit, but for some reason was ordered by the Judge to be tried separately. That, however, does not alter its nature nor that of the cause of action on which it is based, and limitation is governed by Art. 148. The suit is therefore well within time.

The finding that the profits realized by the defendants were Rs. 600 in each of the two years during which the defendants were in wrongful possession is no longer contested by them. It could not anyhow be contested successfully, as the proper course of compelling the persons in wrongful possession to give and prove a full account of the profits they had received and of making every presumption against them if they failed was not followed, but the usual and obviously wrong course of expecting the plaintiffs to prove the profits the defendants had made and granting them nothing beyond what they could manage to prove. The decree of the lower appellate Court will be set aside and that of the first Court will be restored. The defendants will be ordered to pay the whole of the costs of both parties in all three Courts. The pleader's fee in this Court will be one hundred rupees.

R.K.

Decree set aside.

A. I. R. 1927 Nagpur 304

HALLIFAX AND KOTVAL, A. J. CS.

Dattatraya—Appellant.

v.

Secretary of State for India—Respondent.

First Appeal No. 52-B of 1924, Decided on 10th March 1927, from the decision of the Addl. Dist. J., Amraoti, D/-23rd April 1924, in Civil Suit No. 17 of 1923.

Berar Alienated Villages Tenancy Law—The law is not repugnant to Waste Land Rules of 1865, R. 3.

Whether the rights of the Izardars are governed by the sanad or by the Waste Land Rules, the power of determining the relations between them and their tenants, was reserved by the Government, and the making of the Berar Alienated Villages Tenancy Law which determines such relations cannot be said to be repugnant to either of them. [P 305 C 2]

M. V. Abhyankar—for Appellant.

G. P. Dick, B. K. Bose and V. Bose—for Respondent.

Judgment.—The plaintiffs are a large number of Izardars of Berar represented by Dattatraya Krishna Kane, one of them. They instituted this suit against the Secretary of State for India in Council for a declaration that the Berar Alienated Villages Tenancy Law is beyond the power of the Governor General of India in Council to pass, inasmuch as its provisions are repugnant to the Waste Land Rules of 1865 which govern the proprietary rights of the Izardars, and have the effect of prejudicing and infringing those rights in the ways enumerated in para. 12 (b) (I) to (VII) of the plaint. Several subsidiary declarations in respect of the various rights infringed, which need not be detailed here, were also claimed.

The defence was that the law is not repugnant to the Waste Land Rules or the terms of the Izardars' sanads, that the rights of the Izardars are to be determined by the terms of their sanads, and the Court had no jurisdiction to try the suit as it was in respect of an act of State. The plaintiffs in reply stated that the terms and conditions of the sanads inconsistent with the Waste Land Rules were not binding on the Izardars. The lower Court has dismissed the plaintiffs' suit holding that the passing of the law being an act of State the civil Court was not competent to declare it ultra

vires and that in any case the law was not ultra vires.

The line of argument taken in this Court to support the plaintiff's case was stated at some length, but it is simply that the law in question violates the conditions of the contract between the Government of India and the Izardars and the plaintiffs are entitled, under S. 32, Government of India Act 1915, to claim enforcement of the original contract. It is contended that the conditions of the contract are those stated in the Waste Land Rules of 1865, not those set out in the leases granted to the Izardars under those rules or in the proprietary sanads given subsequently.

The provisions of the Berar Alienated Villages Tenancy Law which are said to violate the Izardar's rights are those regulating the relative rights of the Izardar and his tenants and are mentioned in para. 12 of the plaint. Rule 3 of the Waste Land Rules, which according to the plaintiffs entirely govern their contracts in the matter in question, is as follows :

The lessee to make his own arrangements with his tenants during the period of his lease, and all disputes between them to be settled by the Courts. His tenants will hold on the terms mutually agreed on, and will enjoy such rights and privileges as they may be entitled to under the operation of the revenue laws in force in the locality.

Rule No. 5 (1) contains provisions which will be applicable in cases where the lessee selects a proprietary title after the expiry of the lease. After referring to the proprietor's obligations to make certain annual payments and to maintain a patwari and watchman, it states :

But subject to the above and to the general and provincial laws and regulations, the estate will be his own to dispose of as he pleases.

Clauses 3 and 6 of the standard lease are as follows :

3. During the period of your lease you have full power to make your own arrangements for the cultivation of the land. Disputes between you and your tenants will be settled by the Courts under the revenue law in force.

6. At any time during the lease, or at its expiry, you or your heirs after your death, have the option of selecting either the absolute proprietorship of the village or the simple patelship under the 5th para. of the rules for leasing waste villages in the Hyderabad Assigned Districts, dated the 13th December 1865.

Clauses 6 and 8 of the standard sanad of proprietorship issued to the Izardar are as follows :

VI. The said.....has full power to make his own arrangements for the cultivation of the lands of the villages, subject to such rules and regulations as the Government of India may from time to time prescribe for determining his relations with his raiyats of any description.

VIII. Every matter not otherwise specifically provided for by this sanad shall be dealt with in accordance with the laws and rules for the time being in force in the Hyderabad Assigned Districts.

Rule 3 of the Waste Land Rules and Cl. 3 of the lease refer only to the period of the lease and have no bearing on the present case which is concerned with the subsequent proprietary title, that is the title acquired under the contract that was offered in the rules and again in the deed of lease and was subsequently made in the sanad. That Cl. (6) of the latter document, and even Cl. (3) of the deed of lease reserve to the Government of India the power of altering the mutual rights and liabilities of the Izardars and tenants by future legislation is beyond doubt. That indeed is practically admitted in the contention that the terms of the contract are to be found in the Waste Land Rules only.

But even in those rules the rights of the plaintiffs are stated to be 'subject to "the operation of the revenue laws in force in the locality" while they are lessees, and to "the general and provincial laws and regulations" after they become proprietors. Even if the terms of a contract could be taken to be those first offered by one party to the other, whether they are embodied in the subsequent contract or not, there can be no doubt about those expressions referring to future laws and regulations, and if there were any such doubt, it would be set at rest by the slightly more explicit words used in the other two documents.

Whether therefore the rights of the Izardars are governed by the sanad or by the Waste Land Rules, the power of determining the relations between him and his tenants was reserved by the Government, and the making of the Berar Alienated Villages Tenancy Law which determines such relations cannot be said to be repugnant to either of them. There is no breach of contract and the claim must fail, even on the assumption, about which there is considerable doubt, that S. 32, Government of India Act, has any application in the case. The appeal will accordingly be dismissed and the appellants must pay all the costs, which

will include a pleader's fee of five hundred rupees.

R.K.

Appeal dismissed.

A. I. R. 1927 Nagpur 305

HALLIFAX, A. J. C.

Sitaram Madhoji and another—Plaintiffs—Appellants.

v.

Maroti and others—Defendants—Respondents.

First Appeal No. 56-B of 1926, Decided on 14th April 1927, from the decree of the 1st Cl. Sub-J., Ellichpur, D/- 13th July 1926, in Civil Suit No. 58 of 1925.

Hindu Law—Reversioner—Alienation by a widow—Election to avoid can be made by oral demand or attempt to take forcible possession.

The election of a reversioner to treat the alienation by a Hindu widow as a nullity, so as to make the possession of the alienee wrongful, can be expressed not only by the filing of a suit, but by a simple demand. [P 306 C 1]

The intention of a reversioner to avoid an alienation by a Hindu widow can also be communicated to the alienee by an attempt to take possession forcibly: 34 Cal. 329, (P. C.), *Expl.* [P 306 C 2]

*M. B. Niyogi—*for Appellants.

Judgment.—The last male owner of the property in question was Lakshman Kunbi, who died in 1889. The first plaintiff Sitaram-Madhoji inherited his property when his widow Balambi died on the 15th September 1919. On the 30th October 1920 he executed in favour of the second plaintiff: Sitaram-Hambirji, a champertous sale-deed of half the property that Balambi had alienated during her lifetime, and the present suit is one of at least two instituted by them to recover possession of that property from different alienees. In the plaint which was filed on the 28th March 1925, in addition to the claim for possession, which has succeeded, there was also a claim for mesne profits of the fields in question for the year 1922-23 and the two following years. The net income from the fields during those three years has been found and is admitted by both parties to have been Rs. 1,500.

The present appeal by the plaintiffs is against the refusal of a decree for that amount of Rs. 1,500. The learned Judge of the lower Court has referred to the judgment of the Privy Council in *Bejoy*

Gopal v. Krishna Mahishi (1), and has apparently read it to mean that in a case of this kind the election of a reversioner to treat the alienation by the widow as a nullity, so as to make the possession of the alienee wrongful, can only be expressed by the filing of a suit. That is obviously incorrect; as soon as the reversioner demands possession and it is refused the alienee is a trespasser.

In the judgment it is stated, almost incidentally that the learned Judge does not believe the story put forward by the plaintiffs of a demand for possession in the summer of the year 1921. That question, which is one of fact, is the only question remaining for decision. In the plaint it is stated that the plaintiffs demanded possession and it was refused, but the time at which this was done is not defined further than by saying that it was after the death of Balambi.

The defendant Maroti, who for the most part conducted his own case in the lower Court, as he did here entirely, made no mention in his pleadings of any demand for possession and the matter is not expressly mentioned in any of the issues framed. The third of them is "whether the plaintiffs are entitled to get the profits claimed," and it is apparent from the evidence that was led that the parties understood this to include the question whether the plaintiffs had intimated their intention of avoiding the transfer at any time before the institution of the suit, and if they did, when this happened.

The evidence on this question is as follows: The first plaintiff Sitaram-Madhoji (P. W. 2) says that about a year and a half after Balambi's death, that is about March 1921, he endeavoured to take possession by way of the usual formality of taking ploughs to the land and attempting to plough it, but the defendant Maroti would not allow him to do so. Tilluji Kunbi (P. W. 4) speaking in January 1926, fixes the time as "about four years and some months ago during summer," which is the same. He says that both plaintiffs hired a plough from him and another from one Rajaram Simpi for the purpose of asserting their rights in the conventional way; he did not go with them to the fields, but before they went there (apparently

on the same day, though this is not certain) they told the defendant Maroti in his presence what they were about to do and he "replied that he would see how they would send wakhars to the fields."

Shiamrao Kunbi (P. W. 5), patel of the village, speaks of the same conversation as Tilluji, which both say took place "under a combined *nim* and *wad* tree," and he says it was in the summer of 1921. His version of it is this:

About five years ago both the plaintiffs demanded possession over the fields in suit from the defendant Maroti, and the latter declined to give possession. Defendant Maroti remarked that his father had purchased the fields from Balambi. This was the only dispute. It was in the year 1921 during summer. Witness Tilluji was present there in his *gaiwada* and I was in my house.

The whole of this, except the first sentence, was elicited in cross-examination.

Similarly the second plaintiff Sitaram-Hambirji (P. W. 8) said nothing about the demand for possession till he was questioned about it in cross-examination. Then he said;

About one year after the sale in my favour I had gone to take possession of the fields in the summer of 1921. I do not remember the month of my purchase.

The sale-deed in his favour was executed on the 30th October 1920. No evidence on this or any other point was given by the defendants.

The learned Judge of the lower Court disbelieves this evidence because there is nothing in the plaint beyond the usual formal statement of a demand for possession, which had been refused, and because the story of the attempt to take possession, in addition to the peaceful demand for it, appears to him to be "an after-thought to bring the case within the rule laid down by their lordships" in the Privy Council case previously mentioned. This story is also considered disproved by the deposition of Shiamrao patel (P. W. 5), who says there was no attempt to take possession but only a demand and refusal.

This is based on misconceptions both of the principle stated in the Privy Council case and also of the evidence in the present case. The intention of a reversioner to avoid an alienation by a widow can be communicated to the alienee by peaceful words as well as by an attempt to take possession forcibly, and perhaps better, and the witnesses do not give contradictory versions of a single incident,

(1) [1907] 34 Cal. 329=34 I. A. 87=11 C. W. N. 424 (P. C.).

but versions of two incidents which agree in respect of each. Further the suggestion that an attempt to take possession forcibly would "bring the case within the rule laid down," whereas peaceful demand would not, is incompatible with the view that nothing but the institution of a suit could do that.

It is proved beyond doubt by this evidence that in the summer of the year 1921 the two plaintiffs together told the defendant Maroti that they had no intention of allowing the alienation by Balambi to hold good after her death, and demanded possession of the land, which he refused. Another fact making this still more certain, which seems to have been left out of sight, is that it was in October of the previous year that Sitaram-Madhoji had sold half his rights in the alienated land to Sitaram-Hambirji. It is in the last degree improbable that either of them would wait very long after that without at least asking the defendant to hand over the property to them peacefully.

The plaintiffs are clearly entitled to get Rs. 1,500 from the defendants, but their own delay in bringing the suit cuts them off, not only from claiming any profits for the year 1921-22, but also from getting interest for the period before the institution of the suit and indeed no interest was specifically claimed in the plaint. They are, however, entitled to interest from the date which they did come to Court.

The decree of the lower Court will accordingly be modified by the addition to it of an order that the defendants shall pay to the plaintiffs the sum of Rs. 1,500 with compound interest thereon at 6 per cent per annum from the 28th of March 1925 till the date of payment. The defendants will also be ordered to pay the whole of the costs of the plaintiffs and their own in both Courts. The pleader's fee in this Court will be seventy-five rupees.

R.K.

*Decree modified.***A. I. R. 1927 Nagpur 307**

FINDLAY, J. C.

Pandurang Ramchandra—Plaintiff—Appellant.

v.

Doma and others—Defendants—Respondents.

Misc. Appeal No. 6 of 1927, Decided on 12th July 1927, against the decree of the Addl. Dist. Judge, Nagpur, D/- 30th November 1926, in Civ. A. No. 91 of 1926.

(a) *Civil P. C., O. 22, R. 10—Application under the rule rejected—Appeal under O. 43 R. 1 (1) is the only remedy—Appeal—Plea.*

Where an application by an assignee pendente lite under O. 22, R. 10, is rejected, his only remedy is to file an appeal against this order under O. 43, R. 1, and he has no locus standi to come in appeal against the ex-parte decree in the suit against other defendants, and it is not open to these defendants to raise in the appeal against the ex-parte decree a plea in support of assignee's position. [P 308, C 1]

A. V. Khare and A. V. Zinjarde—for Appellant.

R. N. Padhye—for Respondent No. 4.

Judgment.—The appellant Pandurang Ramchandra sued the respondents Doma and Manaji in the Court of the first class Subordinate Judge, Nagpur, for possession of a house. Doma and Manaji filed an application to the effect that the house had been purchased by one Nilkanth and that they had no title thereto. Nilkanth was accordingly joined as a party and merely raised a preliminary plea to the effect that the proper Court-fees had not been paid. This question was adjudicated upon on 19th March 1926 and time was given for payment of Court-fees. In the meantime, on 7th April 1926, the fourth non-applicant, Mahipatrao, is alleged to have purchased the house in question from Nilkanth. After the purchase, there were two hearings on 29th April 1926 and 25th June 1926, but, as defendants 1 to 3 remained absent, the case was ordered to be heard on 24th July 1926. On that date one witness was examined and decree was passed in favour of the plaintiff.

Meantime, on the same date, the pendente lite purchaser Mahipatrao applied to the Court under O. 22, R. 10, Civil P. C., asking to be made a party on the ground that he had an interest in the subject-matter of the suit. That application had no reasons recorded on the order thereon: it bears merely an en-

dorsement "rejected" signed by the Subordinate Judge.

The judgment and decree having been delivered in the suit, all the three defendants as well as Mahipatrao appealed to the additional District Judge, Nagpur. The learned additional District Judge held that there was no good reason why the fourth appellant, Mahipatrao should not have been made a party, and having reversed the judgment and decree of the first Court, sent the case back for retrial. Against this judgment, the plaintiff has come to this Court on appeal.

Now, in the first place, although the order rejecting Mahipatrao's application was an unsatisfactory and laconic one, it is perfectly clear what the duty of Mahipatrao was. The order in question was passed under O. 22, R. 10, Civil P. C., and under O. 43, R. 1, Cl. (4) an appeal lay against that order. No such appeal was filed by Mahipatrao and I have already remarked that, although the transfer in his favour was effected on the 7th April 1926, he remained absent and took no step whatever at the two intervening hearings and only filed an application to be made a party when the case was fixed for the ex-parte evidence of the plaintiff on 7th April 1926. In those circumstances, therefore, it seems to me that Mahipatrao had no locus standi whatever as an appellant against the judgment and decree which were passed. It is true that the three defendants joined with him in the appeal, but it must be remembered that as against them there was an ex-parte judgment and decree and it seems to me that it was not open to these defendants to raise the plea they did in the additional District Judge's Court in support of Mahipatrao's position: cf. *Hummi v. Aziz-ud-Din* (1).

The point I am really concerned with is, however, that, in my opinion, Mahipatrao had no locus standi whatever in the appeal, he joined in, in the lower appellate Court. His duty was to have filed an appeal against the order rejecting his application to be made a party. It may be that, had he done this, his appeal would particularly merge in the appeal against the judgment and decree, but as the present case stands, I am of opinion

that there being no decree against Mahipatrao, it was incompetent for the lower appellate Court to entertain his appeal against the judgment and decree in question. As I have already pointed out, it was equally incompetent for the three defendants to offer the appeal they did in view of their having allowed the case to proceed ex parte against them. It is perfectly obvious, therefore, that the case as between the plaintiff and Mahipatrao must be fought out in another litigation.

The judgment and decree of the appellate Court are accordingly reversed and instead a decree will issue ordering the three defendants, Doma, Manji and Nilkanth, to put the plaintiff in possession of the house specified in the plaint. The respondents must bear the plaintiff-appellant's costs in all three Courts.

R.K.

Decree reversed.

* A. I. R. 1927 Nagpur 308

KINKHEDE, A. J. C.

Ramchandra and another—Judgment-debtors—Appellants.

v.

Uka and others—Decree-holders—Respondents.

F. A. No. 68 of 1926, Decided on 27th April 1927, from the order of the 1st Cl. Sub-J., Bhandara, D/- 26th June 1926, in execution proceedings in Civil Suit No. 44 of 1918.

* (a) *Limitation Act, Art. 182—The article should be liberally construed in favour of the decree-holder.*

Article 182 should receive a fair and liberal and not too technical a construction so as to enable the decree-holder to obtain the fruits of his decree. The language of the article ought not to be strained in the judgment-debtor's favour: 39 *Mad. 923, Foll.* [P 309, O 1]

(b) *Limitation Act, Art. 182—Application to substitute legal representatives of judgment-debtor is a step-in-aid.*

A step of substituting the legal representative of the deceased judgment-debtor taken by an application is a step which must be treated as one in accordance with the spirit as well as the letter of the law, for it must ultimately assist in the realization of the decree and facilitate the actual execution of the decree when it is taken out. It is therefore a step-in-aid of execution within Art. 182: 2 *C. L. J. 544, Foll.* [P 310, O. 1]

P. S. Deo—for Appellants.

Kolte and Gundhe—for Respondents.

(1) [1917] 39 All. 143=36 I. C. 277=14 A. L. J. 1226.

Judgment.—This is an appeal against an order passed under S. 47, Civil P. C., holding that the application for execution dated 21st December 1925, was within time by reason of the intermediate application, for substitution of legal representative of the deceased judgment-debtors Birbal and Yado, made on 30th September 1924. The suit which was instituted by Birbal, Yado and Balaji against Uka and others for possession of certain immovable property was dismissed by the first Court on 7th May 1920 and they were made liable for defendants' costs. Their appeal was also dismissed in this Court on 9th January 1922. Thus the execution of the decree would be barred after the lapse of three years from the date of the appellate decree. The present application which is dated 21st December 1925 is, therefore, *prima facie* barred by time. It would be in time only if the previous application dated 30th September 1924 is treated as an application for execution or to take a step-in-aid of execution. The lower Court took this view and held that the present application is within time. The judgment-debtors have appealed.

It is argued on behalf of the appellants that under Art. 182, Cl. (5), Sch. 1, Limitation Act, an application which could save limitation must be one which is in accordance with law, and it must be for execution or to take some step-in-aid of execution of the decree, and that in this particular case the application dated 30th September 1924 does not satisfy any of these conditions.

Varadaraja Mudali v. Murugesan Pillai (1) holds that Art. 182 should receive a fair and liberal and not too technical a construction so as to enable the decree-holder to obtain the fruits of his decree. It has been held in numerous cases that the language of the article ought not to be strained in the judgment-debtor's favour. It is said on behalf of the appellants that the Civil Procedure Code nowhere lays down that an application to bring the legal representatives of a deceased judgment-debtor is a necessary preliminary step to the making of an application for execution of the decree against the legal representatives of the deceased judgment-debtor under S. 50

read with O. 21, R. 22, Civil P. C., and that consequently an application whose sole purpose is the substitution of the legal representatives is not an application according to law within the meaning of Cl. (5) of the article, much less could it be treated as an application to take some step in aid of execution. To construe the words of the article in this manner would be hypercritical. What we must look to is the sense and substance of a thing and not merely the letter. The application must certainly accord with law. The article does not say that it should be one prescribed or required by law. There is nothing in the Civil Procedure Code which prohibits a Court from entertaining an application for substitution of the legal representative in place of a deceased decree-holder or judgment-debtor. The application for substitution dated 30th September 1924 was, therefore, certainly a step which did not contravene any express provision of the statute law or conflict with any principle of law, merely because the Court is not expressly empowered by the statute to have recourse to that extraneous assistance. In *Janaradhan v. Narayan* (2) an application made to a British Indian Court to transfer a decree from it to a Court in the native state between whom and the British Government there existed an agreement to execute each other's decrees, was treated as a step in aid of execution within the meaning of Art. 182, Indian Limitation Act of 1908. In my opinion, there is no difference in principle so far as the saving of limitation is concerned between an application for execution drawn up strictly in accordance with the requirements of R. 11, O. 21, and an application to take some step-in-aid of execution, or for the matter of that between an application which asks for transfer of a decree from one Court to another, or an application which prays for the completion of the array of parties by repairing the breach which death has caused therein. Whatever step aids the satisfaction of a decree, aids its execution even though the latter word would be used strictly in a technical sense. Merely because the decree-holder instead of asking the Court which passed the decree to execute the decree against the legal representative

(1) [1915] 39 Mad. 923=30 M. L. J. 460=30 I. C. 707=(1915) M. W. N. 760.

(2) [1918] 42 Bom. 420=46 I. C. 56=20 Bom. L. R. 421.

after service of notice under R. 22, O. 21, Civil P. C., asks that Court to first complete the array of parties and thereafter makes an application for execution of the decree, he cannot be said to have acted in a manner which does not accord with law. He cannot be penalized for having displayed reasonable diligence in getting in the fruits of his decree. The step of substituting the legal representative of the deceased judgment-debtor, thus taken as per application, dated 30th September 1924 was a step which must be treated as one in accordance with the spirit as well as the letter of the law, for it must ultimately assist in the realization of the decree and facilitate the actual execution of the decree when it is taken out. If this step had not been taken earlier the Court whose duty it was to execute the decree would have necessarily been required to take it in execution as contemplated by R. 22 aforesaid. I, therefore, overrule the contention of the appellants and uphold the order appealed against, which finds some support in *Jogendranath Roy v. Rasikchandra Banerji* (3) where it is laid down that the Code of Civil Procedure does not prescribe any substantive application for the substitution of the legal representatives of the deceased judgment-debtor and the application made for such substitution is in substance an application for execution within the meaning of S. 234, Civil P. C., 1882, Art. 179, Limitation Act of 1877 which respectively correspond to O. 21, R. 22, Art. 182 new Civil P. C., and the Limitation Act, 1908.

A minor point which was urged on behalf of Balaji individually, that limitation is not saved as against him is amply covered by Cl. (7), Expl. 1, Art. 182, Limitation Act. The appeal, therefore, fails and is dismissed with costs. Pleader's fee Rs. 25.

R.K.

*Appeal dismissed.***A. I. R. 1927 Nagpur 310**

FINDLAY, J. C.

Bhuwanlal—Defendant—Applicant.

v.

Sumranlal—Plaintiff—Non-applicant.

Civ. Rev. No. 256 of 1926, Decided on 19th March 1927, against the decree of the Addl. Sub-J., 1st Cl., Chhindwara, D/- 16th June 1926.

Civil P. C., O. 6, R. 17—Essentials of amendment indicated.

There are three essential conditions which must ordinarily be fulfilled before an amendment can be allowed. There must be good faith on the part of the plaintiff; the amendment must be possible without prejudice to the defendant and the amendment must not turn the suit into one of a different character.

Where the relief claimed remained the same, where the amendment was suggested at the instance of defendant himself, and where the effect of the amendment was to restrict the relief claimed to what was in reality only a modification of the original relief,

Held: the amendment should be allowed as the defendant by his pleadings must be held to have waived the plea of limitation involved: 33 All. 174; 25 Mad. 448 and A. I. R. 1925 All 69, Dist. [P 311 C 2; P 312 C 1]

V. R. Dhoke—for Applicant.

K. V. Deoskar—for Non-applicant.

Judgment.—The plaintiff non-applicant Sumranlal sued the defendant-applicant Bhuwanlal in the Court of the additional Subordinate Judge, first class, Chhindwara, for possession of five khasra numbers in M. M. Barelipar and Chandanwara on the allegation that these were his khudkasht fields from which defendant had dispossessed him. The parties are real brothers. Defendant denied that the fields were plaintiff's khudkasht or that the latter had any title to them. Defendant's case further was that a partition had been effected by which the fields in suit fell to his share. He admitted having taken possession of the fields on 1st June 1925. The plaintiff traversed these allegations and finally prayed that the suit might be treated as one under S. 9, Specific Relief Act. The additional Subordinate Judge granted this prayer by his order, dated the 30th April 1926, pointing out therein that plaintiff's original relief was only one of possession; that it was defendant who had raised questions of title; and that the alteration made in reality no change in the nature of the case. It is the propriety or otherwise of this order which is in question in the present revision case.

On behalf of the defendant-applicant, the contention has been that the amendment in question should not have been allowed as the relief then claimed was barred, possession having been taken in June 1925, while the amendment was allowed on the 30th April 1926: cf. Art. 3 of the schedule to the Limitation Act. Reliance has been placed on *Upendra Narain Roy v. Janaki Nath Roy* (1), *Mangal Prasad v. Chandramall* (2), *Shriram v. Ganpati Kunbi* (3), and *Nemasa v. Ramkrishna* (4), in this connexion. The Madras case quoted is not peculiarly apposite in this connexion, the points involved being entirely different from the present case. The decision in *Mangal Prasad v. Chandramall* (2) is so far authority for the view that an amendment should not be allowed when its effect is to preclude the defence from setting up a plea like a bar of limitation and that when a new cause of action is added the question whether the claim based on that cause of action is time barred must be determined with reference to the date on which the suit was instituted. A similar view was taken by Ismay, J.C., in *Shriram v. Ganpati Kunbi* (3), while in *Nemasa v. Ramkrishna* (4), the question of allowing a plaintiff to add a fresh relief which meanwhile had become barred was similarly decided. In the same case, it was, however, pointed out that there would be an exception to the above rule when the amendment was ordered at the instance of the defendant.

In the present case we find this is precisely what did occur. The defendant having meanwhile raised pleas of his own title and of plaintiff's want of title expressly went out of his way in his pleader's oral statement recorded by the Court on the 29th March 1926 to plead that plaintiff should be put on his election to decide whether to continue the suit as one of title or as one under S. 9, Specific Relief Act, and the latter course was eventually allowed by the Court. In the present case, moreover, the cause of action, viz., plaintiff's admitted dispossession by the defendant, was one and the same throughout. This was, therefore, in my opinion no case of

addition of a new and novel cause of action. On the contrary, the effect of the amendment was to restrict and narrow the scope of the suit from the one of wider type contemplated by S. 8 to the more particular type embraced by S. 9, Specific Relief Act. The decision in *Lachman v. Shambu Narain* (5), and *Ramaswami Chetti v. Paraman Chetti* (6), are not to the point: in these the learned Judges concerned held that when a suit is fought out on the basis of title and the plaintiff fails, he cannot at a late stage be given a decree under S. 9 on the basis of title only. In the present case the position is entirely different: the amendment has been effected at an early stage before the question of title had been fought out. The decision in *Ganesh Rai v. Bhushi Rai* (7) is inapplicable for the same reason.

There seems to me to be three essential conditions which must ordinarily be fulfilled before an amendment like the present one can be allowed. There must be good faith on the part of the plaintiff: the amendment must be possible without prejudice to the defendant, and the amendment must not turn the suit into one of a different character. There is here no question of mala fides on plaintiff's part: the amendment was made as a result of pleas offered by the defendant who went out of his way to suggest the possibility of its being made. Again I cannot see that defendant was prejudiced. The cause of action, viz., plaintiff's dispossession and the relief claimed, viz., re-entry into possession, remained the same and the question of title will have to be fought out separately. Finally, the character of the suit has not been integrally changed; possession is still claimed, the only difference being that the question of title has been waived aside for the present.

No doubt, the fact remains that the suit as one under S. 9, Specific Relief Act, was barred on the date it was brought, but, in the particular circumstances of this case, where the relief claimed remains the same, where the amendment was suggested at the instance of defendant himself, and where the effect of the amendment is to res-

(1) [1918] 45 Cal. 305=47 I. C. 129=22 C. W. N. 611.

(2) [1905] 1 N. L. R. 117.

(3) [1906] 2 N. L. R. 79.

(4) [1914] 10 N. L. R. 32=23 I. C. 165.

(5) [1910] 33 All. 174=7 I. C. 495=7 A. L. J. 1078 (F. B.).

(6) [1902] 25 Mad. 448=11 M. L. J. 403.

(7) A. I. R. 1925 All. 69=46 All. 903.

strict the relief claimed to what is in reality only a modification of the original relief, I am of opinion that the amendment was rightly allowed and that the defendant by his pleadings must be held to have waived the plea of limitation involved.

The application, therefore, fails in the main. As regards Court-fees, however, the lower Court erred in allowing Court-fees and pleader's fees in full. These should have been allowed at half rates in view of the change in the nature of the suit having regard to Art. 2, Sch. 1, Indian Court-fees Act. The lower Court's decree will be modified accordingly. As regards costs in this Court: in view of applicant's partial success and partial failure, I order the parties to bear their own respectively.

R.K.

Decree modified.

* A. I. R. 1927 Nagpur 312

FINDLAY, J. C.

Vinayak—Plaintiff—Appellant.

v.

Sitabai and others—Defendants—Respondents.

S. A. No. 589 of 1925, Decided on 28th April 1927, against the decree of the Dist. Judge, Nagpur, D/- 18th September 1925, in Civil Appeal No. 87 of 1925.

* (a) *Hindu Law — Alienation — Widow — Consent of reversioners — No question of necessity arises.*

Under the Bombay school of Hindu law, no question of legal necessity, as such, arises, when the next reversionary heirs have consented to the alienation. [P 313 C 2]

(b) *Minor — Arbitration.*

Where a minor is not validly represented in the award and subsequent Court proceedings by his guardian, the guardian having an interest adverse to the minor, proceedings against him are not binding on the minor: *A. I. R. 1924 Mad. 297*; and *A. I. R. 1922 All. 91, Ref.* [P 314 C 1]

(c) *Transfer of Property Act, S. 6 (a) — Hindu reversioner.*

A remote reversioner has only a spes successionis and this cannot be the subject of a contract or agreement: *A. I. R. 1917 P. C. 95, Ref.* [P 314 C 1]

A. V. Wazalwar—for Appellant.

R. W. Date and M. R. Indurkar—for Respondents.

Facts.—The minor plaintiff Vinayak sued the six defendants for possession of

a 2-anna share in mauza Khapri and of houses and kothas therein as well as for a declaration that the decree in suit No. 47 of 1921 in the Court of the first Munsiff, Katol, was void and inoperative against him. The main facts are: On 24th August 1918, Mt. Tanabai, along with her daughter Anjirabai (mother of the plaintiff) and Rangobai, defendant 3, (wife of Govind Rao defendant 2, and the mother of Mahadeo and Gulab Rao, defendants 4 and 5) mortgaged the property of her deceased husband Narain Rao to defendant 6 Bajirao Ganpatrao. The mortgage was for Rs. 2,000 carrying interest at 12 per cent. per annum with a condition of foreclosure if the debt was not paid within three years. On the same date, Tanabai also executed a registered deed of gift of the same property in favour of the plaintiff and of defendants 4 and 5 Mahadeo and Gulab Rao. On 3rd February 1921, defendant 6, the mortgagee, assigned his mortgage to the first five defendants for consideration. Immediately after that, the first five defendants on the one side and Tanabai, Anjirabai and the plaintiff on the other agreed to refer the claim of the mortgage-transferees to an arbitrator (Mr. Khandekar, pleader). The latter duly gave an award which was eventually filed in Court in suit No. 47 of 1921. The mortgage claim was admitted by a pleader, who appeared for Tanabai, Anjirabai and the minor plaintiff, and decree for foreclosure (preliminary) was passed on 22nd November 1921, while the final decree was obtained on 24th March 1923. Possession was taken by the assignee-decreeholders on 18th April 1923. Plaintiff's case was that the decree was obtained fraudulently, that essential facts were concealed from the Court, that the plaintiff's interest as a donee was suppressed before the arbitrator and the civil Court and that Anjirabai, his mother, had an interest adverse to his own, and on those and other grounds his case was that the decree was void and inoperative against him and that he was entitled to be replaced in possession of his share of the property, from which he was dispossessed under the said decree.

The plaintiff's suit was dismissed.

The plaintiff appealed to the Court of the District Judge, Nagpur, questioning many of the findings arrived at by the

first Court. The learned District Judge agreed with the Subordinate Judge that the mortgage-deed was not vitiated by fraud or by want of consideration. He also pointed out that the arbitration proceedings as well as the evidence of Mr. Khandekar (P. W. 1) showed that at the time the plaintiff's position as a donee had not been suppressed. The Judge of the lower appellate Court, however, held that Anjirabai was an improper person to act as guardian ad litem for the plaintiff in the arbitration proceedings and the subsequent suit in view of the fact that, as one of the assignees of the mortgage, she possessed a claim to the property, which was adverse to her son's claim as donee. The learned District Judge further found that when application was made to the Court on the strength of the agreement arrived at in the arbitration proceedings, the express leave of the Court should have been obtained. He pointed out that prima facie both the improper representation of the minor by Anjirabai and the fact that the Court did not give its leave for the agreement she had made on behalf of the minor, would be sufficient ground for setting aside the foreclosure decree as against the plaintiff. He further held that legal necessity for the greater part of the mortgage debt had not been established. Having found so far, therefore, in favour of the present plaintiff-appellant, the lower appellate Court then pointed out that the parties were governed by the Bombay school of Hindu law and that, on the strength of the decisions in *Bajrangi Singh v. Manokarnika Bakhsh Singh* (1), *Bepir Behari Kundu v. Durga Charan Banerji* (2), and *Mallik Saheb v. Mallikarjunappa* (3), Tanabai had power, altogether apart from the question of legal necessity, to alienate the estate with the concurrence of the body of persons constituting the next reversionary heirs. In this case Anjirabai and Rangobai were the next reversioners and they concurred in the alienation by joining in effecting it. As regards the deed of gift, he pointed out that it could not render the mortgage

invalid as it was executed subsequent thereto and because it was not in favour of the next reversioner, the mere fact of these two reversioners being mentioned as guardians of the third (donee) being an insufficient basis on which to presume their consent to the gift. Holding thus that, although the plaintiff was not properly represented in the arbitration proceedings and in the subsequent mortgage suit, the minor plaintiff would all the same have had therein no plea open to him, on which he could have defeated the claim of the first five defendants, the District Judge arrived at the conclusion that the suit was bound to fail and dismissed the appeal of the plaintiff who filed the second appeal.

Judgment.—(After stating facts as above the judgment proceeded.) The findings of fact arrived at by the lower appellate Court have not been questioned in second appeal and only questions of law remain for consideration. The first question for consideration concerns the propriety of the finding of the District Judge that as the next reversioners Mt. Anjirabai and Mt. Rangobai concurred in the mortgage by Mt. Tanabai, plaintiff has no locus standi to question the transaction. The contention of the appellant in this connexion is that even granting that the parties are governed by the Bombay school of law, the appellant is still entitled to enforce his equity of redemption and that the decree in suit No. 47 of 1921 is not and cannot be binding on him. The decisions in *Rangasami Goundan v. Nachiappa Gounden* (4) and *Debi Prosad Chowdhury v. Golap Bhagat* (5) have been relied on in this connexion as laying down the principle that the only effect of the consent of the next reversioners in a transaction such as I am concerned with is to raise a presumption that the transaction was a right and proper one, i. e., justified by legal necessity. These cases, however, have little direct bearing on the present one in which the parties being governed by the Bombay school of Hindu law, no question of legal necessity as such arises, and so far I find myself in complete agreement with the finding arrived at by

(1) [1908] 30 All. 1=35 I. A. 1=11 O. C. 78=5 A. L. J. 1 (P. C.).

(2) [1908] 35 Cal. 1086=8 C. L. J. 120=12 C. W. N. 914.

(3) [1914] 38 Bom. 224=22 I. C. 292=15 Bom. L. R. 1142.

(4) A. I. R. 1918 P. C. 196=42 Mad. 523=16 I. A. 72 (P. C.).

(5) [1913] 40 Cal. 721=17 C. L. J. 499=19 I. C. 273=17 C. W. N. 701 (F. B.).

the District Judge in para. 6 of the judgment appealed against: cf. *Malik Saheb v. Malik Arjunappa*³ (3).

But, apart from this, another aspect of matters has to be considered in the present case. The District Judge has found that the plaintiff was not validly represented in the award and subsequent Court proceedings by his mother who, as one of the mortgagees, asserted an interest adverse to him. In my opinion, this fact vitiated these proceedings against him: cf. *Sellappa Gounden v. Masa Naiken* (6), and *Murlidhar v. Pitambar Lal* (7). Even assuming, therefore, that the gift was subsequent to the mortgage, the plaintiff was at least entitled to his equity of redemption and the proceedings in suit No. 47 of 1921 must be considered a nullity as against him.

Moreover, there is still another point to be considered with reference to the arbitration proceedings at that time. Plaintiff, as a remote reversioner, had only a spes successionis, and this could not be the subject of such a contract or agreement, as took place in the present instance: cf. *Amrit Narayan Singh v. Gaya Singh* (8).

On both these grounds, therefore, I am of opinion that the plaintiff is entitled to succeed so far as his claim for a declaration is concerned. The judgment and decree appealed against are accordingly reversed and a decree granting plaintiff a declaration that the decree in suit No. 47 of 1921 is void and inoperative against him will issue. As plaintiff cannot in the present state of matters succeed in whole as regards the relief claimed by him and has failed as regards the relief of possession, the suitable order as regards costs seems to me to be that the parties should bear their own costs as incurred in all three Courts. I order accordingly.

R.K.

Appeal partly allowed.

A. I. R. 1927 Nagpur 314

FINDLAY, J. C.

Baldeo Prasad—Applicant—Appellant—
v.

Dhanaram—Non-applicant — Respondent.

Misc. Ap. No. 53 of 1926, Decided on 29th March 1927, from the order of the Addl. Dist. Judge., Nagpur, D/- 21st August 1926, in Misc. Judicial Case No. 23 of 1926.

Guardians and Wards Act, S. 25—Father leading an immoral life—Children living with maternal uncle—The power delegated by the father to the uncle for custody should not be allowed to be revoked.

Where the father is content to allow another relation to take over and bear the burden of the maintenance and the education of his children for many years, and where during this period he is leading an immoral life, to take these children from the environment in which they were living and place them in their father's house would amount to little more than an act of gross cruelty, and the father should not be allowed to revoke the authority which was given to the relation to have the custody of his children: *A. I. R. 1914 P. C. 41, Rel. on*; *A. I. R. 1924 All. 622, Diss. from.* [316 C 2]

R. N. Padhey—for Appellant.

Judgment.—The present appellant, Baldeo Prasad, applied under S. 25, Guardians and Wards Act, for the restoration to his custody of his three minor daughters aged, according to the finding of the lower Court, 14, 10 and 8 years respectively. These three children are at present in the custody of the respondent Dhanaram, their maternal uncle. Admittedly, the wife of the appellant and the mother of the children died some seven years ago. She actually died in the respondent's house and ever since then until recently, even on the appellant's own case, he assented to the children being maintained and brought up by the respondent. On 20th April 1926 a notice was served on the respondent asking for the return of the custody of the children, but this not being complied with the appellant filed the application referred to in the lower Court.

The application was resisted on various grounds by the respondent and amongst these were the following:

(a) That the respondent had brought about and celebrated the marriage of the eldest girl who meanwhile has died;

(b) that three years after his wife's death the appellant took a mistress to

(6) *A. I. R. 1924 Mad. 297=47 Mad. 79.*

(7) *A. I. R. 1922 All. 91=44 All. 525.*

(8) *A. I. R. 1917 P. C. 95=45 Cal. 590=45 I. A. 35 (P. C.).*

live in his house and she still resides there. Allegations were also made that appellant had treated the mother of the minors cruelly, that he drank heavily and smoked ganja; and

(c) that the appellant had also arranged an unsuitable marriage for the eldest child Rampiari with one Bhika, this agreement only being cancelled with difficulty owing to the efforts of the respondent.

It was further pled that the real object of the present application was to marry Rampiari to a man Satyanarayan, who, the respondent alleges, is an unsuitable match for her. The man in question has one eye and is pitted with smallpox, and the child before the lower Court stated her unwillingness to be allied to this man. It was further pled that the girls have lived so long under the affectionate care of the respondent and have formed association with his family which it would be improper to sever. The respondent is, on the appellant's own admissions, in an infinitely better financial state than the appellant.

The lower Court, after recording the statements of the parties and of the three children, came to the conclusion that, regard being had to the interests of the girls themselves, it was desirable that they should continue to live with the respondent. The additional District Judge was also influenced by the fact that the appellant has, for years, had a mistress living in his house and, on these and kindred grounds, he declined to give the father the custody of his children.

In a case like this, we must start from the dictum laid down by their Lordships of the Privy Council in *Annie Besant v. Narayaniah* (1), which is to the following effect:

The father is the natural guardian of his children. This guardianship is in the nature of a sacred trust, and he cannot, therefore substitute another person to be guardian in the place. He may, it is true, in the exercise of his discretion as guardian, entrust the custody and education of his children to another, but the authority he thus confers is essentially a revocable authority and if the welfare of his children require it, he can, notwithstanding any contract to the contrary, take such custody and education once more into his own hands.

The proposition stated in the passage quoted above speaks for itself and the

only question is as to whether there are sufficient circumstances in the present case which would entitle this Court to prevent the revocation of the authority undoubtedly given in the past by the father to the respondent in the matter of the three children in question.

Much stress has been laid on behalf of the appellant on the decision of Walsh, Ag. C. J., and Neave, J., in *Sukhdeo Rai v. Ram Chandra Rai* (2). The learned Judges pointed out in the said case that a father is not liable to be deprived of the society of his child, merely because he is leading an immoral life and it was pointed that an immoral father has just as good a right to his children as a moral man, and that in many cases he is as likely to see that his children are brought up properly, even if he himself does not live in that fashion. With all deference to the learned Judges who have decided the case quoted, I am unable to agree that in the majority of cases a father, who is leading an immoral life, *prima facie* is likely to have the real and best interests of his children at heart as a moral father. The mere fact of his immorality rather suggests the opposite presumption. It is not, however, necessary for me in the present instance to hold that merely because the present appellant still continues to have a mistress in the house, this of itself would be sufficient ground for preventing the revocation of the authority in the past by the appellant to the respondent. It has indeed been urged on behalf of the appellant that the mistress in question is now blind and is only retained by the appellant in his house out of pity. Whether this be so or not, seems to me immaterial, but on the record there are strong grounds for believing that the appellant has had a son by this mistress. He admits that a child was born to her after she became his mistress, but professes ignorance as to who the father of the child was, a most unlikely matter in the circumstances.

In the present case, however, another principle seems to me to come into operation. For some seven years back the father has voluntarily allowed the respondent to maintain, look after and nurture all these three children. They have meanwhile been brought up in an

(1) A. I. R. 1914 P. C. 41=38 Mad. 807=41 I. A. 314 (P. C.).

(2) A. I. R. 1924 All. 622=46 All. 706.

atmosphere and environment which, on the material on record, there is every reason to suppose to be much superior and more beneficial to them than the atmosphere of their natural father's house would be. In those circumstances, I am of the opinion that the present case is one where the father must be held to have lost his right to the guardianship of his children, not only because he has deliberately permitted the respondent for seven years to undertake the duties of their maintenance and education which primarily should have fallen on the father himself, but also because, at the age these children have now reached, it would be obviously detrimental to their best interests to alter the manner of their maintenance or the course of their education. When to this fact is added the one that the father proposes to take these children to his house where a woman, who was or possibly still is his mistress, continues to reside, the present case seems to me undoubtedly one in which the Court should exercise its discretion against the father under S. 25 of the Guardians and Wards Act. The mere fact that the eldest child has expressed her unwillingness to return to her father would be no ground under the law, as it at present stands, for dismissing the appeal now before me: nor do I think that the fact that the father proposes to ally her in marriage with a man, who is equally unacceptable to the child herself and the respondent, would *prima facie* be a sufficient ground for denying to the father his natural right to the custody of his daughter.

In *Bindo v. Sham Lal* (3), Knox and Richards, JJ., set aside the authority of the father to the custody of his own daughter, aged 10, chiefly on the ground that the father had married again and the child was likely to be happier with her maternal grandmother. That decision was, in my opinion, dissented from for good reasons by Ayyar and Napier, JJ., in *Audippa v. Nallendrani* (4), but the present case is a much stronger one than the Allahabad case referred to. Here, for years past, the father has been content to allow another relation to take over and bear the bur-

den of the maintenance and the education of his children. During this period he has himself been leading an immoral life and to take these children from the environment in which they are now living and place them in their father's house would, in my view, amount to little more than an act of gross cruelty. I have not the slightest hesitation in holding on the material on record that the father in the present instance is unfit to have the custody of his children and it follows that the present is a case where he should not be allowed to revoke the authority which was given long ago to the respondent to have the custody of his children.

These findings govern the appeal which is accordingly dismissed without notice to the respondent.

R K.

Appeal dismissed.

A. I. R. 1927 Nagpur 316

MACNAIR, A. J. C.

Sakharam and others—Defendants 2-5—Appellants.

v.

Tukaram and another—Plaintiff and Defendant 1—Respondents.

F. A. No. 55-B of 1925, Decided on 19th March 1927.

(a) *Court-fees Act, S. 7 (iv) (cc)*—Order under S. 146, *Criminal P. C.*, to sell crops—Decision that retention of sale-proceeds unnecessary—Suit by other party—Suit must be for declaration and also possession—Ad valorem Court-fee is necessary—*Specific Relief Act, S. 42*—*Criminal P. C., S. 146*.

Where a Magistrate passes an order under S. 146, *Criminal P. C.*, a person claiming the property need only sue for a declaration.

But where the Magistrate interfered with the possession of the defendants because an emergency had arisen and decided that retention of the sale proceeds was unnecessary, and ordered them to be handed over to the defendants, *Held*: the Magistrate was holding the same on behalf of the defendants, and plaintiff's suit must be one for possession and ad valorem fees calculated on the value of the subject-matter in dispute must be paid. [P 317 C 2]

(b) *Transfer of Property Act, S. 52*—Lease by mortgagor—Mortgagee is entitled to mortgagor's share—Section does not apply.

Where an agricultural lease by the mortgagor in the ordinary course of management is for the benefit of the mortgagee, S. 52, *Transfer of Property Act*, has no application. [P 318 C 2]

M. Y. Shareef—for Appellants.

P. B. Gole and V. N. Bapat—for Respondents.

(3) [1907] 29 All. 210=4 A. L. J. 22=1907 A. W. N. 24.

(4) [1915] 39 Mad. 473=28 M. L. J. 442=29 I. C. 4=1915 M. W. N. 330.

Order on Preliminary Point.

During the hearing of this appeal a question was raised whether the memorandum was sufficiently stamped or not. The material facts as stated to me by the parties are these. The plaintiff obtained possession of certain fields in execution of two decrees on the 14th November 1923. The defendants who were lessees of the mortgagor prevented him from taking the crops standing therein. Proceedings under S. 145, Criminal P. C., were started and the Magistrate considering the case one of emergency attached the crops, sold them and retained the proceeds. The Magistrate decided that the lessees should be treated as being in possession of the crops and passed an order, a copy of which forms Ex. P-7, directing that the proceeds of sale should be made over to the lessees. The plaintiff filed a suit claiming the sale-proceeds paying Court-fees ad valorem. In appeal the lessees have asked merely for a declaration, and the Court-fee on the memorandum is Rs. 15. They urge that the plaintiff should have sued only for a declaration.

I have no doubt that where a Magistrate passes an order under S. 146, Criminal P. C., a person claiming the property need only sue for a declaration. He does not need to sue Government as Government is merely holding the property on behalf of the true owner. The present case, however, appears to me different. The Magistrate had interfered with the possession of the defendants because an emergency had arisen. Before this suit was filed he had decided that retention of the sale-proceeds was unnecessary. He was holding the sale proceeds on behalf of the defendants. In my opinion the defendants must be considered to have been in possession when the suit was instituted. The law does not readily adopt the view that property is in the possession of no one who claims title.

If A's property had been sold in execution of a decree and the balance of the price was held by the Court for payment to A, surely B, if he claimed that he was entitled to the balance because he had had interest in the property, could not sue for a declaration. The same principle should in my opinion govern the present suit.

In *Vedanayaga Mudaliar v. Vedammal* (1), the defendant was in possession of certain property apparently on behalf of a minor son. Proceedings were taken for the appointment of a guardian for that son, and the District Judge appointed a receiver to whom the property was made over. The order of the District Judge was set aside in appeal and it was directed that possession of the property should be handed back to the defendant. This order was passed subsequent to the death of the son. It was not carried out, and the plaintiff sued. It was held that the plaintiff could sue for a declaration as the property was in custodia legis and in the hands of an officer of the Court. I must, with respect, dissent from this decision. The defendants may be in my opinion in possession of property even if some private person or a Court holds on their behalf and there is a possibility that the plaintiff may obtain an ad interim order that such person or Court should not deliver the property to the defendants.

The plaintiff, then, was right in suing for possession, and the defendant-appellants must pay ad valorem fees calculated on the value of the subject-matter in dispute. It has not been suggested that the appellants should not be allowed to modify this appeal. Fee must be paid and alteration made by 25th February 1927.

Judgment.—The plaintiff obtained possession of certain fields in execution of a decree on a day when crops were standing in the fields. The defendants, alleging that they were lessees of the judgment-debtor, prevented the plaintiff from taking the crops. Proceedings under S. 145, Criminal P. C., followed, the crops were sold and the proceeds were held by the criminal Court which ordered that they should be paid to the defendants. The plaintiff sued for the sale-proceeds, Rs. 5,250. The main defence was that the lessees were bona fide transferees, and the leases were binding on the plaintiff. The learned Sub-Judge has held that the defendants are bona fide lessees, but that the leases are not binding on the plaintiff. The suit was decreed, and the defendants appeal.

The ground that the suit was bad for misjoinder is hardly pressed. Order 1, R. 3, appears to me to permit the join-

(1) [1904] 27 Mad. 591.

der. The main ground of appeal is that the plaintiff decree-holder is bound by the leases.

For the respondent it is strongly urged that the judgment-debtor himself cultivated the land and that the story of the leases is an invention intended to prevent the decree-holder from obtaining the standing crops. It is admitted by the lessees that the leases were given on favourable terms, but an explanation of this is offered. The plaint shows that the fields were sold by action on 12th December 1922 in execution of a decree obtained by one Gurmukh. The sale was not confirmed till 31st July 1923. I am told that the sale has subsequently been set aside. The judgment-debtor Sheoram (D. W. 1) states that he had sold his bullocks to pay the debt due to Gurmukh Marwari. Even after the sale of the bullocks the judgment-debtor may have hoped to cultivate the land himself as he had done in previous years.

But finally he had to lease out his lands. This explanation appears to be natural.

It is next urged that the absence of the lease deeds is suspicious and is not explained. I remark that it was unnecessary for the defendants to allege that deeds of lease for a single year had been executed. The story that they were lost in the course of the police investigation is quite a natural one. There may be some discrepancies, but the defendants may not remember exactly who had the deeds last. It is clearly stated that the documents were produced before the police, and the plaintiff has not troubled to cross-examine the witnesses on this point or to summon the investigating officer in order to contradict them. It is next pointed out that there are numerous discrepancies regarding the execution of these leases. The witnesses were examined some two and a-half years after the execution. There is much force in the contention of the appellants' counsel that witnesses of this sort make wild statements in cross-examination and that had the story of the leases been false there would have been more efforts at consistency. The learned Judge who heard the witnesses has believed them and I see no reason to disagree. No inference can be drawn from a slip made by the learned Judge who states in para. 10 that defendants 2 to 4

were to have only a one-third share in the crops. The learned Judge himself recorded the evidence and the witnesses state that the terms of the leases were favourable. I agree, then, with the finding that the leases were given on the terms alleged by the defendants.

I have next to deal with the point whether the leases are binding. The learned Sub-Judge is clearly mistaken in saying that the leases in question were not for the benefit of the plaintiff-mortgagee. The plaintiff-mortgagee will clearly get the lessor's share of the crops. It has been held that the leases were granted at a later stage when the judgment-debtor finally found he could not arrange for cultivation by himself. Had the leases not been granted there would have been no crops. Batten, A. J. C., in *Shri Ganesh v. Pandurang* (2) expressed the opinion that if the lease in that suit had been given in the ordinary course of management he would hold that it did not prejudicially affect the rights of the new malguzar. The proposition that an agricultural lease may come under the provisions of S. 52, Transfer of Property Act, is sound, but this does not mean that all agricultural leases must come under these provisions.

I hold that on the facts found the leases did benefit the plaintiff-mortgagee who is undoubtedly entitled to a substantial share of the crops raised. Section 52 of the Transfer of Property Act, then has no application. It is not urged before me that the plaintiff could have obtained over a thousand rupees by the use of the land if the land had been fallow when he obtained possession in November. The appeal, therefore, must succeed. Each defendant must pay the share of the proceeds which represents the share of the lessor in the produce of the field reaped. I accept the evidence that the conditions of cultivation were those alleged by the defendants, and I do not see reason for making the appellants jointly liable. The decree of the lower Court is set aside, and the case is remanded in order that a decree may be passed in accordance with these directions. Costs in both Courts will be in proportion to success and failure.

R.K.

Appeal allowed.

A. I. R. 1927 Nagpur 319

FINDLAY, J. C.

Sadashiv Rao—Auction-purchaser — Applicant.

v.

Umaji and another—Judgment-debtor and Decree-holder—Non-applicants.

Civil Revision No. 94 of 1927, Decided on 12th July 1927, against the order of Dist. Judge, Chhindwara, D/- 31st March 1927, in Misc. Appeal No. 13 of 1926.

Civil P. C., O. 21, R. 90—Material irregularities ejusdem generis with those alleged in the application coming to light—Court should consider them while deciding the application.

If in the course of an enquiry in an application under O. 21, R. 90 any further material irregularities come to light ejusdem generis with those alleged in the original application, provided the parties have due notice of the question involved, it would be the duty of the Court to take these additional material irregularities into consideration in coming to a decision as to whether an auction sale was a legal one or not : *A. I. R. 1926 All. 305, Rel. on.* [P 319, C 2]

R. W. Date—for Applicant.

W. R. Puranik—for Non-applicant No. 1.

Order.—That on the findings arrived at by the learned District Judge—findings of fact which this Court should not be at liberty to disturb in civil revision—there were most serious defects and irregularities in connexion with the auction sale I am concerned with, cannot be questioned for one moment. Doubt existed as to whether the permission granted to the decree-holder to bid above Rs. 500 related to the five houses en bloc or to each separately. Apparently, also other intending purchasers were in doubt as to whether the houses as they stood were being sold or only their materials. No proper description had been given of the property or its value: these and other irregularities undoubtedly occurred. What has been urged on behalf of the applicant is that, in the original application filed by the non-applicant Umaji, various grounds of irregularity, which the District Judge has taken into consideration were not mentioned. It is clear, however, that the main allegation, viz., that other intending purchasers wished the houses to be put up separately, whereas as a result of collusion between the agent of the decree-holder and the malguzar, the houses were sold en bloc, does appear in the original application.

In any event, I do not think that the present applicant can derive benefit from the decision in *Harbans Lal v. Kundan Lal* (1). If in the course of an enquiry, such as has been made by the lower Courts in this case, any further material irregularities come to light ejusdem generis with those alleged in the original application, it seems to me that, provided the parties have due notice of the question involved, it would be the duty of the Court to take these additional material irregularities into consideration in coming to a decision as to whether an auction-sale like that we are concerned with was a legal one or not. Mukerji, J., in *Ram Saran Das v. Girdhari Lal* (2) has pointed out that when a specific material irregularity has been alleged and when additional particulars subsequently come to light, which amount to a further material irregularity or to an increase in the original one alleged, it is open to the Court to take these matters into consideration. All that really happened in the District Judge's Court was that further particulars as regards the highly unsatisfactory conditions under which this was conducted, came to the surface and were adjudicated upon by it. The sale, in short, was, from every point of view, a bad one and, although in the original application, the present non-applicant 1 did not enter all the particulars of the irregularities in question, the fact remains that he alleged material irregularity in support of the basic defect which relates to the doubt as to whether the houses were to be sold en bloc or separately. That was, in my opinion, a defect which went to the root of the sale and, even apart from the other considerations mentioned by the learned District Judge, would have amply justified the order passed by the latter.

I see no reason, therefore, to interfere and dismiss the application. Applicant must bear the non-applicant 1's costs. Costs in the lower Courts as already ordered.

R.K.

Application dismissed.

(1) [1898] 21 All. 140 = (1898) A. W. N. 212.
(2) A. I. R. 1926 All. 305 = 48 All. 286.

A. I. R. 1927 Nagpur 320

MACNAIR, A. J. C.

Thakur Mooratsingh and others—Plaintiffs—Appellants.

v.

Munilal—Defendant—Respondent.

Second Appeal No. 21 of 1926, Decided on 22nd June 1927, against the decree of the Addl. Dist. J., Damoh, D/- 8th October 1925, in Civil Appeal No. 32 of 1925.

(a) *C. P. Tenancy Act, S. 89—Tenancy can be terminated in any way at the desire of both parties.*

S. 89 (1) specifies the conditions under which an absolute occupancy or an occupancy tenant may surrender his holding without consulting the wishes of his landlord. It does not state that the contract of tenancy cannot be terminated in other ways at the desire of both contracting parties. [P 320 C 2]

(b) *Occupancy Holding—Suit by landlord for ejectment—Defendant not claiming through the tenant—He cannot plead that tenant has not surrendered.*

When a landlord sues to eject a trespasser from a tenancy holding, it is not open to the defendant, who is not a transferee from the tenant and does not hold under the tenant, to plead that the tenant has not abandoned the holding 11 N. L. R. 124, *Foll.* [P 320 C 2]

(c) *C. P. Tenancy Act, S. 38—Sub-tenancy for one year does not continue after that year.*

There is no presumption that a sub-tenancy for a single year continues after that year expires: 14 N. L. R. 3, *Dist.* [P 320 C 2]

V. Bose and P. N. Rudra—for Appellants.

A. V. Khare and W. B. Pendharkar—for Respondent.

Judgment.—The plaint alleges that one Bhurey, tenant of a holding in the patti of which plaintiff 1 is the lambar-dar, surrendered his holding on 19th June 1924. The plaintiffs began to plough the fields but were ousted by the defendant who had been in possession as sub-tenant of Bhurey in the previous year. They sued therefore to eject the defendant. The defence was that the defendant had been holding under the plaintiff lambar-dar for a number of years and that Bhurey had no right in the fields at the date of surrender.

The first Court held that the plaintiffs' allegations were true and passed a decree for possession. In first appeal it was held that as the deed of surrender was executed on 19th June 1924, the plaintiffs had no title to possession of the fields during the agricultural year

1924-25. The other points raised in first appeal were not decided.

In second appeal the decision of the lower appellate Court is attacked. It is clear that that decision is erroneous. In the first place, S. 89 (1) of the Central Provinces Tenancy Act, specifies the conditions under which an absolute occupancy or an occupancy tenant may surrender his holding without consulting the wishes of his landlord. It does not state, nor can it be inferred that the contract of tenancy cannot be terminated in other ways at the desire of both contracting parties.

In the next place, when a landlord sues to eject a trespasser from a tenancy holding, it is not open to the defendant, who is not a transferee from the tenant and does not hold under the tenant, to plead that the tenant has not abandoned the holding; *Sahasram v. Sheonath* (1).

The respondent's Counsel urges that the plaint admits that the defendant was a sub-tenant in 1923-24 and that it should be presumed that this sub-tenancy was renewed for the ensuing year. He relies on *Sheomanga v. Nanhelal* (2). But that ruling refers to a sub-tenancy from year to year, and the plaint merely states that the defendant had been a sub-tenant for one year. The defendant never alleged in this suit that he had been a sub-tenant of Bhurey from year to year. There is, then, no basis for a presumption that the sub-tenancy for a single year continued after that year expired. After the expiry of the year the respondent was a trespasser. He cannot, then, plead that the tenant has still a right to the holding.

The decree of the lower appellate Court must therefore be set aside, and the case must be remanded to that Court for decision of the remaining grounds of appeal. Costs in this Court will be costs in the suit. A certificate for refund of Court-fees paid in this Court will be given to the appellants.

R.K.

Case remanded.

(1) [1915] 11 N. L. R. 124=31 I. C. 303.
(2) [1918] 14 N. L. R. 3=43 I. C. 392.

A. I. R. 1927 Nagpur 321

FINDLAY, J. C.

Bapurao and others—Defendants—Appellants.

v.

Narayan Keshav Ghande—Plaintiff—Respondent.

S. A. No. 76-B of 1926, Decided on 16th March 1927, from the judgment of the Addl. Dist. Judge, Yeotmal, D/- 20th November 1925, in Civil Appeal No. 75 of 1925.

Court-fees Act, S. 12 (ii) — Suit for ejectment stamped under S. 7 (xi) (cc)—Defendant raising question of title and Court decreeing suit on the same—Defendant appealing but paying Court-fee not on market value—No defect of jurisdiction—Question of Court-fee will not be allowed to be first raised in second appeal—Civil P. C., S. 100.

Plaintiff claimed possession of a house from a tenant holding over and paid Court-fee under S. 7 (xi) (cc). The defendants raised the question of title and in consequence of their plea, the question of title had to be gone into. The defendants appealed but did not pay Court-fee on the market value of the house. In second appeal defendants raised an objection that as Court-fee was paid under S. 7 (xi) (cc) plaintiff should not have been given a decree on the basis of title.

Held: that as the objection had only been raised for the first time in second appeal and as appellants (defendants) in their appeal in the lower appellate Court only paid Court-fees at the lower rate themselves, the question should not be reopened, no defect of jurisdiction being involved. [P 322 C 1, 2]

V. V. Kelkar—for Appellants.

M. V. Niyogi—for Respondent.

Judgment. — The defendants-appellants, Bapurao, Govinda and Anna, have come to this Court on second appeal against the judgment and decree of the Additional District Judge, Yeotmal, dated 20th November 1925, by which their appeal against the decision of the Subordinate Judge, 2nd class, Kelapur, dated 17th August 1925, putting the plaintiff in possession of the house in suit, was dismissed.

There are only four points raised in the present appeal. The first of these is that the lower Courts have erred in holding that there had been a partition between Sitaram and his brothers. On this point I cannot find the slightest room for interference on second appeal. It is true the evidence is more circumstantial than direct, but in the case of a partition which occurred, as the one in suit is alleged to have occurred many years ago, direct evidence may naturally not be forthcoming. The very detailed and

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careful consideration of all the evidence made by the Subordinate Judge is on the whole conclusive on this point and there is no room whatever for this Court sitting as one of second appeal to disturb either the finding of the original Court in this connexion or that of the appellate Court.

The second point urged in second appeal is that the sanitation clerk should have been examined on commission with respect to the sanitation papers produced in the evidence on behalf of the defendants. Had the decision of the first Court stood good in this connexion, viz., that there was nothing to show that the entries in the sanitation register related to the house in suit, there might have been some substance in this connexion but, as the first Court has very properly pointed out, even if we assume that the entries referred to relate to the house in suit, their existence in no way shows that Baliram was owner of the house, the obvious explanation was that he paid the charges on Sitaram's behalf during the latter's illness.

The third point urged on behalf of the defendants-appellants is that the possession of Baliram was also adverse, viz. during the two years or so he lived in the house in suit along with Sitaram. Such a suggestion is totally contrary to the probabilities of human nature and experience. It is perfectly clear that Baliram went, out of affection, to live in Sitaram's house when the latter was ailing and nearing his end, and there is nothing whatever to suggest that during that period his possession could be or was adverse. The findings of fact arrived at by both the lower Courts are undoubtedly sound and they, in effect, dispose of this allegation.

There remains the fourth contention urged in appeal, viz. that as the plaintiff came to Court paying Court-fees under S. 7 (xi) (cc), Indian Court-fees Act, for recovery of the house from his tenant, and as the plea of lease has been held unproved, the plaintiff was not entitled to succeed on the strength of a title raised independently of the alleged lease to the tenant. It is true that in para. 10 (b) of the plaint, an alternative plea was urged that if the Rs. 25 claimed as rent could not be recovered as such, it should be decreed as mesne profits. The fact, however, remains that possession

was claimed in the present suit as from the tenant in respect of his holding over after the termination of his tenancy. In ground 3 of the petition of appeal it is somewhat ingeniously urged that the lower Courts failed to see that the plaintiff was not entitled to raise the question of, and succeed on, title independently of the alleged lease. As a matter of fact, what really occurred was that it was the defendants who raised the question of title and it was in consequence of their plea that the question of title, apart from the lease had to be gone into. Moreover, it is pertinent to remark that, even in their appeal to the Court of the Additional District Judge, the appellants refrained from raising the present question and expressly valued their appeal at only Rs. 75. I have been referred to the decision in *Pramatha Nath Ganguly v. Amiraldi Sheikh* (1) and *Balasidhan-tam v. Perumal Chetti* (2). The former decision is not peculiarly apposite. In it a suit for khas possession was instituted against three defendants. The defendant 1 admitted that he had been holding the land under a lease from the plaintiff, which had expired. The other two defendants established their plea that there was no relationship of landlord and tenant between the plaintiff and them. The Court held that, in the circumstances of the case, the suit could only proceed against defendant 1 on a plaint stamped under S. 7, Cl. (ii), Court-fees Act. In the Madras case quoted, the Court-fees were paid under the same provision, and what Aiyar and Sastri, JJ., decided was that the title of the plaintiff need not be gone into in the case. Even assuming, therefore, that the appellants are entitled to raise, as they have done in effect, the plea that insufficient Court-fees were paid, it seems to me that, in the peculiar circumstances of this case, the question of title having been raised by the defendants independently of their denial of the lease and it being clear that, in the circumstances, Court-fees should have been payable on the market value of the property under S. 7, Cl. (5) of the Court-fees Act, the question which remains is whether on that market value the Judge of the first Court had jurisdiction to entertain the plaint and decide the case. I

have verified the fact that the Subordinate Judge in question had at the time jurisdiction in suits of the nature of the present one up to Rs. 1,000. I have at the hearing recorded the statements of counsel and they are agreed that the market value of the property is Rs. 1,000. Therefore, had the suit been framed in the form in which the present defendants-appellants now allege it should have been, for this is, in effect, what their allegation in para. 3, petition of appeal amounts to, the Subordinate Judge in question would have had jurisdiction to try and dispose of the suit. As this objection has only been raised for the first time in second appeal and as appellants-defendants in their appeal in the lower appellate Court only paid Court-fees at the lower rate themselves, I do not think this question should be reopened now, no defect of jurisdiction being involved.

The appeal accordingly fails and is dismissed. Appellants must bear the respondents' costs. Costs in the lower Courts as already ordered.

R.K.

Appeal dismissed.

A. I. R. 1927 Nagpur 322

KINKHEDE, A. J. C.

Gangaprasad and another—Defendants—Appellants.

y.

Kodulal and another—Plaintiffs—Respondents.

S. A. No. 68 of 1925, Decided on 28th June 1927, against the decision of the Addl. Dist. Judge, Jubbulpore, D/- 8th November 1924, in C. A. No. 49 of 1924.

Civil P. C., S. 11—Alternative causes of action—O. 2, R. 2.

A person is not bound to sue on an alternative cause of action and failure to so sue in the former suit does not bar subsequent suit.

[P 322 C 2]

W. B. Pendharkar—for Appellants.

H. S. Gour, M. R. Pathak and K. A. Poley—for Respondents.

Judgment.—The sole question argued is whether the present suit for accounts is barred by the former suit either under S. 11, Expl. 4, or O. 2, R. 2, Civil P. C. I am of opinion that the appeal of the defendant must fail for the simple reason that the plaintiff was not bound to sue

(1) [1920] 24 C.W.N. 151=55 I.C. 178.

(2) [1914] 27 M.L.J. 475=27 I.C. 162=1 M. L.W. 641.

on the alternative cause of action in the former suit. Though he might have sued in the alternative there was nothing in law which showed that he ought to have done so in the former suit.

The appeal, therefore, fails and is dismissed with costs.

R.K.

Appeal dismissed.

A. I. R. 1927 Nagpur 323

KINKHEDE, A. J. C.

Sheoram—Defendant—Appellant.

v.

Rambhau and others—Plaintiffs—Respondents.

F. A. No. 38-B of 1926, Decided on 11th July 1927, from the decision of the 1st Addl. Dist. Judge, Akola, D/- 25th March 1926, in Civil Suit No. 3 of 1925.

Trusts Act, S. 43 — Co-trustee not consulting others—Exclusive management bona fide—No corrupt motive—He should not be removed—Opportunity should be afforded to correct.

Where a co-trustee bona fide believed that he was entitled to call himself a hereditary trustee and as such had the preferential or exclusive right of management of the trust property, and so did not consult his co-trustees in the past and this exclusive management could not be attributed to any corrupt motives on the co-trustee's part.

Held: he should not be absolutely expelled from the management of the trust property. He should have a probationary period wherein he could show his own readiness to act in co-operation with the other co-trustees so as to make the working smooth and unobjectionable in any way. [P 323, C 2]

*G. G. Hatwaine—*for Appellant.

*A. V. Khare and W. B. Pendharkar—*for Respondents.

Judgment. — No attempt has been made before me by the respondent to show that the conclusion of the lower Court that there is a clear indication in the defendant's acts that he wants to thwart the authority of the other trustees and assume the supreme power to himself is in any way unwarranted or unjustified. It is said that this kind of attitude on the defendant's part was due to a bona fide belief that he was entitled to call himself a hereditary trustee and as such had the preferential or exclusive right of management of the trust property, but that since the defendant has now disabused his mind of that impres-

sion he should be given a chance to show that he can work smoothly if allowed to remain on the Board of trustees.

Looking to the antecedent history of the trust, as laid down in *Mahomed Ismail Ariff v. Ahmed Noola Dawood* (1), I think, the defendant had reasonable grounds to think that his voice could reign supreme in the management of the trust, and that he could do every thing according to his own wishes without consulting plaintiff 1 or the other trustees. No doubt there was this failure to consult his co-trustees in the past, but the plaintiffs have not been able to show that this exclusive management was attributable to any corrupt motives on the defendant's part, because the lower Court has very correctly pointed out that no misapplication of the trust money is brought home to the defendant. All that is proved against him is, if I may so put it, his vanity which prevented him in the past from associating himself with the other co-trustees. But for that alone he ought not to be visited with an absolute expulsion from the management of the trust property. It would be a very disproportionate punishment for his failures. I think under the peculiar circumstances of the case, the defendant should have a probationary period wherein he could show his own readiness to act in co-operation with the other co-trustees so as to make the working smooth and unobjectionable in any way and thus ensure the interests of the trust and its property.

I therefore set aside the decree of the lower Court and the appointment of Baliram Jeewaji Teli of Borgaon made thereunder and remand the case to the Court below with directions to fix a reasonable period of probation for the above purpose and give the defendant an opportunity to show that he can usefully serve on the Board of trustees and that his continuance on the Board is for the interest of the trust and its property.

In the circumstances of the case, I direct that each party shall bear his own costs of this Court. Costs in the Court below will be costs in the cause.

R.K.

Case remanded.

(1) A. I. R. 1916 P. C. 132=43 Cal. 1085=43 I. A. 127 (P. C.).

A. I. R. 1927 Nagpur 324 (1)

KINKHEDE, A. J. C.

Mohamad Hatam—Judgment-debtor—Applicant.

v.

Ramdutt Kisandayal Firm—Decree-holder—Non-applicant.

Civ. Rev. No. 95-B of 1927, Decided on 11th July 1927, against the order of the Addl. Dist. Judge Akola, D/- 7th April 1927, in execution proceedings arising out of Civil Suit No. 6 of 1925.

Civil P. C., S. 70 (2)—Notification transferring jurisdiction to Collector—Civil Court's jurisdiction ousted.

The jurisdiction of the civil Courts in the matter of the execution of decrees in cases in which any interest, in land used for agricultural purposes or held on a tenure which is recognized at the time of the settlement of such land, or of houses or of other immovable property connected with such land or interest, and used for agricultural purposes is to be sold, is ousted by notification which transfers it to the Collector with effect from 1st April 1927. [P 324 C 1]

B. K. Bose and A. V. Khare—for Applicant.

D. W. Kathalay—for Non-applicant.

Order.—The order sought to be revised is clearly wrong and cannot be allowed to stand. The wording of the notification is clear and ousts the jurisdiction of the civil Courts in the matter of the execution of decrees in cases in which any interest, in land used for agricultural purposes or held on a tenure which is recognized at the time of the settlement of such land, or of houses or of other immovable property connected with such land or interest, and used for agricultural purposes, is to be sold, and transfers it to the Collector with effect from 1st April 1927. The proposed sale by the civil Court would thus be ultra vires and without jurisdiction and the same must be therefore stopped. I therefore set aside the order and direct the lower Court to transfer the execution of the decree to the Collector as required by the notification.

The revision is allowed with costs to be paid by the non-applicant. The pleader's fee will be Rs. 50 in this Court.

R.K.

Revision allowed.

A. I. R. 1927 Nagpur 324 (2)

KOTVAL, A. J. C.

Sheikh Umrao—Plaintiff—Appellant

v.

Sheikh Karim and others—Defendants—Respondents.

S. A. No. 231-B of 1926, Decided on 12th April 1927, from the decree of the Spl. Addl. Dist. Judge, Akola, D/- 8th February 1926, in Civil Appeal No. 64 of 1925.

Mahomedan Law — Gift — Marz-ul-mout. Essentials discussed.

That illness alone which in the ordinary course is fatal and from which the person suffering eventually dies and which is accompanied by an actual apprehension of death in the sufferer's mind or by circumstances likely to create in him the apprehension of death comes within the definition of a marz-ul-mout. The essential condition of a marz-ul-mout is the apprehension or fear of death in the sufferer's mind. To enable one to decide whether such apprehension existed or was likely to have existed certain tests have been prescribed by the Mahomedan lawyers which, however, are not conclusive either with respect to the illness or the apprehension. When a person has suffered from an illness, which is ordinarily mortal for a long time, so that it has become, as it were, a part of his constitution and thus ceased to cause apprehension of death, the illness is not a marz-ul-mout. The time which may be considered long enough to negative the existence of the apprehension is a year or more. But a long continued illness may become a marz-ul-mout when it begins to increase in severity and the increase ends with death for the aggravation is to be taken as a new illness likely to create fear of death in the sufferer's mind. Inability to attend to one's daily avocations or to stand up to say one's prayers may be regarded as a test of marz-ul-mout, for such inability in a person suffering from a mortal disease may ordinarily be taken as sufficient to create an apprehension of death: 3 C. W. N. 57; 31 Cal. 319 and 35 Cal. 271, (P. C.) *Foll.* [P 325, C 1].

A. Bhagwant and S. A. Ghadgay—for Appellant.

M. B. Niyogi—for Respondents.

Judgment.—Sheikh Chand was the father, and Nur Muhammad, the deceased father of defendants, 1 to 4 was the brother of the plaintiff Umrao. Sheikh Chand died on the 24th November 1909. On the 4th November 1909 by a deed, which though called a "settlement patra" is really a deed of gift, he had given away the whole of his property to Nur Muhammad.

The plaintiff claims a half-share of the property by partition alleging that the

gift was void as it was made in the course of a marz-ul-mout, that is death-illness.

The only point for decision here is whether the disposition was made in a marz-ul-mout. It has been found by the lower appellate Court that Sheikh Chand was suffering from asthma for 30 or 35 years and that the immediate cause of his death was high fever from which he suffered for five or six days before his death.

That illness alone which in the ordinary course is fatal and from which the person suffering it eventually dies and which is accompanied by an actual apprehension of death in the sufferer's mind or by circumstances likely to create in him the apprehension of death comes within the definition of a marz-ul-mout.

The essential condition of a marz-ul-mout is the apprehension or fear of death in the sufferer's mind. To enable one to decide whether such apprehension existed or was likely to have existed certain tests have been prescribed by the Mahomedan lawyers which, however, are not conclusive either with respect to the illness or the apprehension. When a person has suffered from an illness, which is ordinarily mortal, for a long time so that it has become as it were, a part of his constitution and thus ceased to cause apprehension of death the illness is not a marz-ul-mout. The time which may be considered long enough to negative the existence of the apprehension is a year or more. But a long-continued illness may become a marz-ul-mout when it begins to increase in severity and the increase ends with illness likely to create fear of death in the sufferer's mind. Inability to attend to one's daily avocations or to stand up to say one's prayers may be regarded as a test of marz-ul-mout, for such inability in a person suffering from a mortal disease may ordinarily be taken as sufficient to create an apprehension of death: see Ameer Ali's Mahomedan law, Vol. 1, S. 4: *Hassarat Bibi v. Golam Jaffar* (1), *Fatima Bibee v. Ahmad Baksh* (2), and *Fatima Bibi v. Ahmed Baksh* (3). Applying the law as stated above, the gift in question cannot be treated as one made in a marz-ul-mout. Asthma is not

a disease which is ordinarily mortal. It did not incapacitate Sheikh Chand from standing up for prayers or attending to his daily avocations or personal needs and was not likely to have created a fear of death in his mind. The high fever of which he died came nearly three weeks after the gift was made. The gift was, therefore, not made in a marz-ul-mout.

The appeal fails and is dismissed with costs.

D.D.

Appeal dismissed.

A. I. R. 1927 Nagpur 325

FINDLAY, J. C.

Murlidhar and another—Defendants—Appellants.

v.

Hussain Khan—Plaintiff—Respondent.

S. A. No. 314 of 1926, Decided on 24th June 1927, against the decree of the Dist. Judge, Nagpur, D/- 19th February 1926, in Civil Appeal No. 127 of 1925.

(a) *Landlord and Tenant—Sir land—Land held in severalty—Proprietor and not lambardar is the landlord.*

Where *sir land* has been distributed and has been held in severalty, each proprietor is the landlord of the land so held by him; 15 C. P. L. R. 143, Foll. [P 326 C 1]

(b) *C. P. Tenancy Act (1920), Ss. 12 and 13—Ex-proprietary tenant of sir land held in severalty surrendering it to the proprietor—Lambardar is not entitled to dispossess the proprietor under S. 13.*

Where co-sharers, holding *sir land* in severalty sell their share to a stranger and then surrender their ex-proprietary rights to him, the lambardar is not entitled to apply under S. 13 to set aside the transaction and the revenue Court has no jurisdiction to put the lambardar in possession: A. I. R. 1924 Nag. 381, Ref. [P 326 C 2]

*A. V. Wazalwar—*for Appellants.

*G. R. Trivedi—*for Respondent.

Judgment.—The plaintiff, Hussain Khan, is a 3 anna 6 pies co-sharer in mauza Gohjar (Chhindwara). He acquired this share under a registered sale-deed, dated 30th June 1922 (Ex. P.4) from the previous co-sharers Ganpat Rao. Damodar, Prahlad and Shri Niwas. On execution of the sale-deed, the vendors became ex-proprietary tenants of the three fields in suit, but four days later, viz., on 4th July 1922, they surrendered

(1) [1899] 3 C. W. N. 57.

(2) [1904] 31 Cal. 319.

(3) [1908] 35 Cal. 271=35 I. A. 67=7 C. L. J. 122=12 C. W. N. 214 (P. C.).

three fields to the plaintiff on payment of a consideration of Rs. 610. Defendant 1, Murlidhar, is the lambardar of the patti in which the fields are situated. He presented an application under S. 13, Tenancy Act 1920, to the Deputy Commissioner, Chhindwara, and obtained possession of the fields from the plaintiff in pursuance of the said application. The other three defendants are subsequent transferees of the land.

The plaintiff filed the present suit to recover possession of the three fields from the defendants and also alleged that the action of the revenue authorities in placing defendant 1 in possession was ultra vires and without jurisdiction. The Subordinate Judge held that the fields in suit were the exclusive *sir* of the plaintiff, that he alone had the right to take a surrender of the land and that the action of the revenue authorities in connexion with defendant 1's application was without jurisdiction. The first two defendants appealed to the Court of the District Judge who confirmed the judgment and decree of the first Court.

In this Court it is not now denied that the *sir* land in question was held in severalty and as the exclusive property of the present plaintiff. It is urged, however, that, in view of S. 188, Sub-S. (2) (a), Land Revenue Act, the lambardar must be deemed to be the landlord of the fields in question and that, therefore, the application to, and orders of, the revenue Court were competent and could not now be questioned in the civil Court. In this connexion I have been referred to the remarks of Hallifax, A. J. C., in *R. S. Ramkrishnapuri v. Tanba* (1), but nothing in these remarks seems to carry the contention of the appellants so far as it would be necessary to go for his success in this appeal. The law as laid down by Ismay, J. C., in this connexion in *Dhondba v. Vishwanath* (2), seems to me still to stand good and nothing in the provision of the Land Revenue Act 1917, relied on by the plaintiff, seems to me to detract from the view that where *sir* land has been distributed and has been held in severalty, each proprietor is the landlord of the land so held by him.

I do not think on the facts of the

present case it is possible to hold that by any stretching of language the lambardar, defendant 1, can be described as the landlord of the tenants of the fields in question: cf. *Nand Kishore v. Lal Singh* (3). In this view of the case, therefore, I am of opinion that the application under Ss. 12 and 13, Tenancy Act, was an incompetent one and that the revenue Court was acting without jurisdiction in passing the orders it did. I find, myself, therefore, in agreement with the learned District Judge in his finding that the jurisdiction of the civil Courts in the present case is not barred.

It has next been urged that as there were only some four days between the execution of the sale-deed and the surrender-deed, both transactions should be regarded as one and the surrender should be held to have been in contravention of S. 49, Tenancy Act 1920. I do not think that this contention can be accepted as from the present appellants who, on the finding arrived at above, have no locus standi in the matter. If the question could arise at all, it could only be between the ex-proprietary tenants and the present plaintiff.

I find myself, therefore, in complete agreement with the judgment of the learned District Judge and dismiss the present appeal. The appellants must bear the respondent's costs. Costs in the lower Courts as already ordered.

R.K.

Appeal dismissed.

(3) A. I. R. 1924 Nag. 381.

A. I. R. 1927 Nagpur 326

KINKHEDE, A. J. C.

Mt. Bani and others—Defendants—Appellants.

v.

Zamaji and others—Plaintiffs—Respondents.

S. A. No. 218-B of 1926, Decided on 11th July 1927, from the decree of the 1st Addl. District Judge, Akola, D/- 26th February 1926, in Civil Appeal No. 16 of 1926.

Evidence Act, S. 35—Report of death was presumed to be made within a week of its occurrence.

Where the date of death of a person was in question, and a report of death in the kotwal's

(1) A. I. R. 1923 Nag. 153=19 N. L. R. 59.

(2) [1902] 15 C. P. L. R. 113.

diary, dated 6th January 1913 was produced but it did not mention the date of death but the lower Court inferred that the death was within a week of the date of the report :

Held: that the inference drawn by the lower Court was not altogether erroneous or one which could not have been reasonably drawn from facts proved. [P 327 C 1]

W. R. Pendharkar—for Appellants.

G. G. Hatwalne—for Respondents.

Judgment.—The present suit was filed on 22nd December 1924, and it is the plaintiffs' case that they are within time because, according to them, the death of Gangabai after whom they claim to succeed as reversioners took place on 6th January 1913. In support of this contention of theirs they produced a report of her death in the Kotwal's diary of which Ex. P-3 is a copy. This report is dated 6th January 1913 and does not mention the date of Gangabai's death. But the Courts below have inferred that the death was within 12 years of the suit from the fact that the report is dated 6th January 1913, and in the usual course of things it must have taken place within a week of the date of the report. The correctness of this conclusion is challenged by the appellants in this Court on the ground that there is no positive rule in the manual framed by the Local Government under the Berar Land Revenue Code prescribing that the village watchman or the patel of a village in Berar must report births and deaths every week. Looking to the object of these reports and their usefulness in the matter of compiling periodical vital statistics, I am not prepared to differ from the lower appellate Court and hold that the inference drawn by it is altogether erroneous or one which could not have been reasonably drawn from facts proved. It was open to that Court to draw the inference and to come to the finding it did in the state of the record. The appeal, therefore, fails and is dismissed with costs.

D.D.

Appeal dismissed.

A. I. R. 1927 Nagpur 327

MACNAIR, A. J. C.

Mohansingh—Defendant 1 — Appellant.

v.

Punji and another—Plaintiff and Defendant 2—Respondents.

S. A. No. 21-B of 1926, Decided on 5th July 1927, from the decree of the 1st Addl. Dist. Judge, Akola, D/- 30th September 1925, in Civil Appeal No. 103 of 1925.

(a) *Hindu Law—Joint family—No nucleus—Joint brothers purchasing property — Presumption is that they are joint tenants.*

Joint family property can come into existence without a pre-existing nucleus: 32 Bom. 479, *Foll.* [P 328 C 1]

Where three brothers are joint at the time of a purchase there is no presumption that they are each possessed of separate property and that each contributes from his separate property to make up the purchase money. On the other hand, the inference from the facts, that the brothers are joint, that there are no other co-sharers and that the brothers, after the purchase, own the property in equal shares, is that the purchase is made with joint funds. [P 328 C 1]

(b) *Evidence Act, S. 101—Vendor and vendee near relations—Sale-deed with vendor—Vendee must prove that sale was not nominal—Benami. (Obiter).*

Where the vendor and vendee are near relations and the sale-deed is in possession of the vendor the burden of proving that the sale is not bogus is on the vendee. [P 328 C 2]

Fida Hussain—for Appellant.

G. G. Hatwalne—for Respondents.

Judgment.—Govinda, Narayan and Namu were three brothers. The plaintiff Mt. Punji is the daughter of Narayan and his wife Rangubai. Her case was that the field in suit was the property of Laxmibai, mother of the three brothers. Laxmi died in 1908 when her sons were separate. Thus Narayan inherited a one-third share. Narayan and Rangubai became owners of Namu's share by adverse possession, and Rangubai purchased Govinda's share on 18th January 1913. Thus Rangubai became owner of the whole property, and the plaintiff succeeded to her after her death in 1914.

The defence was that the field in suit was purchased by Govinda on behalf of himself and his brothers on 19th February 1901, that the brothers never separated and that in 1916 the manager of the joint family sold the field to one Dhondhu, who in turn sold it to defendant 1.

The first Court held that the field had been purchased by Govinda and his bro-

thers, and that the remainder of the defence was proved. The plaintiff's suit was, therefore, dismissed. In first appeal various contentions were unsuccessfully raised, but the lower appellate Court held that, as there was no nucleus of joint ancestral property, the brothers, after their purchase, became tenants-in-common, and the plaintiff thus succeeded to her father's share. The plaintiff was given a decree for joint possession of the field to the extent of one-third.

In second appeal it is urged that, even if there was no nucleus of joint property, the acquisition by the three brothers would be joint family property. It has been held in *Karsondas Dharamsey v. Gangabai* (1) that joint family property can come into existence without a pre-existing nucleus. Apart from this I consider that the finding of the lower appellate Court regarding nucleus is due to some confusion. It is found that the three brothers were joint at the time of the purchase. There is no presumption that they were each possessed of separate property and that each contributed from his separate property to make up the purchase-money. The inference from the facts, that the brothers were joint, that there were no other co-sharers and that the brothers, after the purchase, owned the property in equal shares, is that the purchase was made with joint funds. It is then joint property and passes by survivorship on the death of a member of the joint family.

It is urged by the respondent that the fact that one brother purported to sell one-third of the field in 1913 indicates that he was a separate owner of the one-third. There is a concurrent finding that this transfer was a bogus transaction intended to defeat creditors. The transfer, then, at the most, shows that the transferrer hoped to induce creditors to believe that he held a separate one-third. It does not lead to any inference regarding the manner in which the land was really held.

The respondent has filed cross-objection attacking the findings of the lower Courts. It is first urged that the burden of proving that the sale-deed executed in favour of Mt. Rangu was a bogus one has been wrongly placed. There is no substance in this ground. If the sole fact to be considered was that the sale-deed

was executed, it would be for the defendants to prove that the deed was bogus. But there are other facts such as the relationship of Rangubai to the vendor, and the possession of the sale-deed by the vendor. If these are considered, the burden of proof may be upon the plaintiff. In any case, the evidence has been fully considered. There is a finding on proper evidence that the vendee was never in possession. There is no reason for interference with the concurrent finding that the sale-deed was nominal.

The appeal, therefore, succeeds. The decree of the first Court is restored, and the plaintiff respondent must bear the costs in all Courts. Cross-objection is dismissed : costs on the objector.

R.K.

*Appeal allowed :
Cross-objection dismissed.*

A. I. R. 1927 Nagpur 328

FINDLAY, J. C.

Gulam Abbas—Plaintiff—Applicant.

v.

Secretary of State for India—Defendant—Non-applicant.

Civil Revision No. 437 of 1926, Decided on 28th June 1927, from the order of the Sm. C. Court, Judge, Nagpur, D-/ 19th November 1926, in S. C. Suit No. 2168 of 1925.

(a) *Railways Act, S. 75—Articles specified in Sch. 2 included in consignment—Consignee must prove what articles are contained in the several parcels—Evidence Act, S. 106.*

Where articles specified in Sch. 2, Railways Act and requiring a special declaration under S. 75 are included in a consignment, the burden of proof as to what articles are contained in each specific parcel and that the value of such special articles in each package was less than Rs. 100, rests on the consignee as the contents of each parcel is a special matter of knowledge to the consignee. But onus to prove the loss of packages rests on the railway company. [P 329 C 1]

(b) *Railways Act, S. 75—"Parcel" or "package" does not include plural.*

The word "parcel" or "package" in S. 75, Railways Act, does not include the plural. [P 329 C 2]

R. N. Padhye—for Applicant.

W. B. Pendharkar—for Non-applicant.

Order.—As a result of the re-trial ordered in my judgment, dated the 30th September 1925, in Civil Revision No. 71 of 1925, the Judge of the Small Cause

(1) [1908] 32 B. n. 479=10 B. n. L.R. 181.

Court has dismissed the plaintiff's suit and he has now come up here on revision. The findings of the Small Cause Court Judge are that articles specified in Sch. 2 Railways Act and, therefore, requiring a special declaration under S. 75 were included in the consignment in question. As the plaintiff had, however, failed to prove what specific articles were included in each parcel and, even supposing that the articles liable to be declared had been included in one package, as plaintiff averred, the Judge of the Small Cause Court held that it was impossible to settle the value of the articles contained in the second package, even if these articles did not comprise any of the special ones liable to be declared under S. 75, Railways Act.

It has been suggested before me on behalf of the applicant that the burden of proof as to what articles were contained in each specific parcel, rested on the railway company. It is hardly necessary to take this contention seriously. On the face of it, the contents of each parcel should have been a special matter of knowledge to the consignee and it was for him, through his consignor, to prove this. Abbas Ali (P. W. 1), the munim of the firm in Bombay, who despatched the consignment, explicitly stated that he was unable to be precise as to the articles included in each package, and in those circumstances it was for the plaintiff to show that the special articles were divided between the two packages to an extent which would mean that the value of such special articles in each package was less than Rs. 100. This, however, has not been proved and indeed plaintiff's position, vide para. 5 of his written statement, dated 12th September 1924 gives no go by to any such assumption.

Some attempt has been made to argue that the kamarakhi valued at Rs. 30 were made of earth and not of glass. Thus, on the applicant's case, there are only articles worth Rs. 89-12-0 to be specially declared. I cannot, however, accept the contention in question. Tahar Ali (P. W. 4) explicitly describes kamarakhi as made of glass. It is true that Mohsin Ali (P. W. 2) says that kamarakhi may be of earth or of glass, but it was for the plaintiff-applicant to establish this point on which he or his consignor must have had special

knowledge in the circumstances. On the evidence, therefore, as a whole, I am of opinion that the lower Court was justified in holding that, even if we assume that all the articles liable to be declared were contained in one package, there has been no specific proof as to the value of the articles in the second package. In other words, there is nothing whatever to show that, besides the articles liable to be specially declared in the first parcel, other goods were also not included therein.

I am wholly unable to accept the contention urged on behalf of the non-applicant that the word "parcel" or "package" in S. 75, Indian Railways Act, must, under S. 13 (2), General Clauses Act 1897, be taken to include the plural, as well. Such an argument overlooks the words "unless there is anything repugnant in the subject or context," contained in the provision in question. If the intention of the legislature had been as suggested by the non-applicant, the word "consignment" would undoubtedly have appeared in S. 75 of the Act. The plaintiff's case is, therefore, a somewhat hard one, because assuming that the special articles were all included in the one parcel or package, he would have been entitled to compensation as regards the contents of the other; but, in the circumstances of the case, I do not see how it is possible to give him any relief. He has had abundant opportunity to prove his case but has failed to do so by any satisfactory and detailed evidence.

It has also been suggested that the railway company have failed to prove the loss of the packages. Undoubtedly, the onus in this connexion rested on the defendant company, but in my opinion it is amply discharged by the evidence of Vishwanath Krishna Dandekar (D.W.1) and Dwarkanath Rajaram (D. W. 2).

I am unable, therefore, to interfere and dismiss the application. In the peculiar circumstances of the case which is from certain points of view a very hard one, I order costs in both Courts to be borne by the parties incurring them.

R.K.

Application dismissed.

A. I. R. 1927 Nagpur 330 (1)

MACNAIR, A. J. C.

Krishna—Judgment-debtor—Appellant.

v.

Narayan—Decree-holder—Respondent.

S. A. No. 379 of 1927, Decided on 19th July 1927, from the order of the 2nd Addl. Dist. Judge, Wardha, D/- 3rd September 1926, in Civil Appeal No. 10 of 1926.

C. P. Tenancy Act, S. 12—Land originally malik makbuza treated by holder as tenancy holding for more than 12 years—Holder becomes an occupancy tenant—His decree-holder cannot therefore attach the land.

Where land originally malik makbuza has been treated by the holder as his tenancy holding for more than 12 years, he cannot claim any rights greater than those of a tenant in the land, and as an auction-purchaser cannot obtain any rights which the judgment-debtor can no longer enforce, and as tenancy rights are not attachable, the rights of such malik makbuza cannot be attached and sold. [P 330, C 1, 2]

D. T. Mangalmurti—for Appellant.*Balwantrao Pendharkar*—for Respondent.

Judgment.—This appeal was registered as a miscellaneous appeal, but it appears to be a regular second appeal against an order passed in execution. The decree-holder attached a field which is recorded in the revenue papers as occupancy field of the judgment-debtor. The judgment-debtor contended that the field was not liable to be attached and sold. The first Court upheld this contention, but in appeal it was held that the judgment-debtor was the malik makbuza proprietor of the field and that, therefore, the field was liable to be sold. It seems probable that Ex. N-A-1, a copy of a judgment delivered in 1914, correctly explains how the field came to be recorded as a tenancy holding. It was originally the malik makbuza plot of the judgment-debtor's predecessors. Houses were built upon it, and it was accordingly recorded as abadi. Then the houses fell down and the land was cultivated. The original title of the judgment-debtor was overlooked and it was recorded as his occupancy holding. The judgment-debtor has been treating it as his tenancy holding ever since the settlement entry of 1911. He filed a suit in 1913 and de-

scribed the plot as his tenancy holding. It is clear that he has been admitting the title of the malguzar as his landlord ever since 1911. He cannot now claim any rights greater than those of a tenant in the land. An auction purchaser cannot obtain any rights which the judgment-debtor can no longer enforce. The rights of a malik makbuza then cannot be attached and sold. Tenancy rights are not attachable, and the rights of the judgment-debtor in this suit cannot be attached.

The remark in Ex. N. A-1, that the field is a malik makbuza plot, has no bearing on this case. It may be that in 1913 the judgment-debtor could have claimed this plot as his malik makbuza. He cannot do so now when the rights of the landlord as proprietor of the plot have been adverse to him for over 12 years.

The appeal must, therefore, succeed. The decree of the lower appellate Court is set aside and the decree of the first Court is restored. Costs in both appellate Courts will be borne by the respondent decree-holder. Pleader's fee Rs. 20.

R.K.

Appeal allowed.

A. I. R. 1927 Nagpur 330 (2)

FINDLAY, J. C.

Mt. Gangoo and another—Plaintiffs—Appellants.

v.

Laxman—Defendant—Respondent.

S. A. No. 368 of 1926, Decided on 12th July 1927, from the decree of the Dist. Judge, Nagpur, D/- 6th April 1926, in Civil Appeal No. 263 of 1925.

C. P. Tenancy Act, (1920), S. 13—Widow can surrender the tenancy even to defeat the reversioners—Reversioners' remedy is to attack it as transfer under S. 13.

Section 11, Tenancy Act, 1920, is the only provision which makes any distinction between the tenancy of a house and an agricultural tenancy of an occupancy field. Tenancy, like other contracts, is essentially personal and there is nothing apart from the said provision which limits the rights of a Hindu woman in respect of the contract of tenancy. A Hindu widow is therefore entitled to surrender the tenancy and that holds good, even if her motive is to affect the reversioners' rights and to secure the tenancy for her intended husband; *A. I. R. 1927 Nag. 129, Foll.*; *A. I. R. 1925 Nag. 306*

Dist. The only remedy the reversioners have is to attack the surrender as a transfer under S. 13, C. P. Tenancy Act 1920 [P 331, C 2; P 332, C 1]

A. V. Khare and A. V. Zinzarde—for Appellants.

V. Bose and P. N. Rudra—for Respondent.

Judgment.—The present suit was brought by Mt. Gangoo and Mt. Rangoo, the two minor daughters of Shiva Teli, deceased, for possession of three occupancy fields in mauza Pendhri (Nagpur). Their father Shiva had been the tenant of these fields, and on his death his widow, Mt. Soni succeeded to the tenancy. On the 3rd April 1924 Mt. Soni surrendered the field to the malguzar and on the same day the malguzar gave a perpetual lease of them to Laxman, the present-defendant-respondent. Very shortly afterwards, Laxman married Mt. Soni by *pat*. The Judge of the first Court held that the transactions of surrender and lease were fraudulent; that, in the circumstances, the civil Court had jurisdiction to interfere and that plaintiffs were entitled to succeed.

The defendant Laxman appealed to the Court of the District Judge. The latter rightly pointed out that as regards the question of consideration for the surrender, this was primarily a matter as between the parties concerned and cannot be raised by a stranger. As he pointed out, the only question for consideration was, in reality whether the reversioners have the right to question Mt. Soni's surrender in the civil Courts. The District Judge pointed out that, under S. 35, C. P. Tenancy Act 1898, a Hindu widow's surrender can not be impeached except on account of fraud or any like ground: *cf. Dajiba v. Raghunath* (1), and the position remains the same having regard to S. 89, C. P. Tenancy Act 1920. The only way, therefore, in which, in the District Judge's opinion, the present plaintiffs could have contested the surrender of the tenancy was by any application under Ss. 12 and 13, Tenancy Act 1920. He further pointed out that the only species of fraud, which would enable the plaintiffs to sue in the civil Courts, would be fraud on the surrendering tenant. The learned District Judge accordingly dismissed the plaintiffs' suit and they have now filed the present appeal.

(1) [1913] 9 N. L. R. 126=20 I. C. 920.

Reliance has been placed on a long series of decisions in this Court to the effect that the civil Courts have jurisdiction to interfere on the ground of fraud: *cf. Ganeshdas v. Shankar* (2), *Wasudeo v. Bhiwa* (3), *Pandurang v. Baiya* (4), *Sheodayal v. Rewaprasad* (5), and *Deoram Gujar v. Biju Gujar* (6) and it has been urged that, on the wording of the plaint, the civil Court had jurisdiction and relief should be granted on the ground of fraud. As I read para. 3 of the plaint, to which I have given my careful attention, the fraud alleged was one on the plaintiffs committed jointly by their mother and by Laxman with the object of securing the tenancy to themselves or to Laxman in view of the *pat* marriage which was about to take place when the transaction impeached occurred.

For my own part, as at present advised, I can see not the slightest reason for differing from the view I have taken in *Deoram Gujar v. Biju Gujar* (5) quoted above, but it, nevertheless, seems to me impossible to allow the plaintiffs-appellants' present contention to succeed. The matter seems to me to be, in fact, put at rest by the decision of Hallifax, A. J. C., in *Bikram v. Thakur Ganesh Singh* (7). As the learned Assistant Judicial Commissioner pointed out therein, S. 11, Tenancy Act, 1920, is, in effect, the only provision which makes any distinction between, say, the tenancy of an house and an agricultural tenancy of an occupancy field. Tenancy, like other contracts, is essentially personal, and, I know of nothing apart from the said provision which limits the rights of a Hindu woman in respect of the contract of tenancy. I do not think it can be suggested for one moment that the ruling of Hallifax, A. J. C., referred to necessarily conflicts with the actual decision of Baker, J. C., and Kinkhede A. J. C., in *Wasudeo v. Bhiwa* (3), quoted above. As was pointed out by Hallifax, A. J. C., the case in question dealt with the passing, on the death of a Hindu woman, of a tenancy inherited by her from a male and held by her up

(2) [1912] 8 N. L. R. 22=13 I. C. 909.

(3) A. I. R. 1925 Nag. 306=21 N. L. R. 62.

(4) A. I. R. 1925 Nag. 251.

(5) A. I. R. 1926 Nag. 222.

(6) A. I. R. 1927 Nag. 226.

(7) A. I. R. 1927 Nag. 129=23 N. L. R. 1.

to her death, not with her rights and liabilities in respect of it during her life.

In the present case there was clearly no fraud on Mt. Soni; on the contrary, the plaintiff-appellants' own allegation rather is that Mt. Soni disposed of her tenancy right in collaboration with Laxman the defendant-respondent, in a method calculated to overreach their rights as reversioners. As the law at present stands, Mt. Soni was clearly entitled to surrender and that holds good, even if we assume that her motive was to defeat the reversioners' rights and to secure the tenancy for her intended husband. In those circumstances, the only remedy the plaintiffs had, in my opinion, was to attack the surrender as a transfer under S. 13, C. P. Tenancy Act 1920.

I am of opinion, therefore, that the decision of the learned District Judge is correct and I see no reason to interfere. The appeal is accordingly dismissed. The appellants must bear the respondent's costs. Costs in the lower Courts as already ordered.

R. K.

Appeal dismissed.

A. I. R. 1927 Nagpur 332

KINKHEDE, A. J. C.

Dalchand Thakurdas—Plaintiff—Appellant.

v.

Ganpat and another—Defendants—Respondents.

S. A. No. 68-B of 1925, Decided on 11th July 1927, from the decision of the Dist. Judge, Amraoti, D/- 10th December 1924, in Civil Appeal No. 230 of 1921.

Transfer of Property Act, S. 55 (4) (b)—Charge for unpaid purchase money—Vendor's assignee can enforce.

Statutory charge for the unpaid purchase money secured to the vendor, by the provisions of S. 55 (4) (b), Transfer of Property Act, enures in favour of the unpaid vendor's assignee also.

[P333 C 1]

B. K. Bose, V. Bose and P. N. Rudra—for Appellant.

H. S. Gour—for Respondents.

Judgment.—The appellant took a lease of the house in suit from defendant 1 Ganpat on 9th September 1920, for a period of 10 years. Thereafter, on the 28th

September 1920, Ganpat mortgaged it to defendant 2 Hydar Ali and agreed to sell the same to him for Rs. 5,000. The very next day he also agreed to sell the same to Dalchand and received a payment of a part of the price, Rs. 500. Subsequently on the 2nd October 1920, he executed a sale-deed in Dalchand's favour and received Rs. 960 at the registration of the sale-deed which took place on 4th October 1920.

Hydar Ali, on the strength of the transaction entered into by him, sued defendant Ganpat and Dalchand for specific performance and possession of the house. That suit was compromised on the 11th April 1921, and it was agreed that Dalchand should deliver possession on the 9th September 1930, to Hydar Ali. It was also agreed that Hydar Ali should withhold payment of the balance of the price to Ganpat until the appellant Dalchand had instituted a suit for the recovery of the amount due to him which the latter agreed to institute within a fortnight.

Dalchand accordingly instituted this suit on the 14th April 1921, and obtained an order of attachment before judgment in respect of the moneys in Hydar Ali's hands and got the notice served on 15th April 1921. But in contravention of the order of attachment, Hydar Ali paid the amount to defendant Ganpat on the 27th April 1921. The plaintiff failed to obtain a decree against Hydar Ali in the Courts below on the ground that he had no cause of action against Hydar Ali, particularly as the latter was not guilty of any breach of the contract to withhold payment for the space of 15 days from the date of the compromise which he made with Dalchand. It was held also that plaintiff had no charge against the property in suit, or Rs. 2,000, the balance of unpaid purchase money in the hands of Hydar Ali. The plaintiff has, therefore, come up in second appeal and I think it must succeed so far as the claim for a charge is concerned.

The personal contract set up by the plaintiff with Hydar Ali was one for withholding payment for a fortnight. It was not for a total abstention from payment to Ganpat or for payment over to plaintiff. The promise was duly fulfilled by Hydar Ali, as will be seen from the date of the payment which is a few days after the lapse of a fortnight from

the date of the compromise. The Courts below were, therefore, right in holding that plaintiff had no cause of action to sue the defendant Hydar Ali for the amount. The plaintiff's claim was decreed against defendant Ganpat.

In view of the attachment before judgment the payment of the amount attached to Ganpat by Hydar Ali on the 27th April 1921, was void as against all claims enforceable under the attachment at the instance of the plaintiff-appellant. But that attachment could not under law give plaintiff a right to obtain a decree for the specific sum attached as if he was the owner thereof. All he could do was to proceed to sell the right to recover the amount attached as the property of his debtor or judgment-debtor, by execution of the decree obtained by him in this suit against defendant Ganpat, and for that purpose he had to rank himself as an attaching creditor along with the other creditors of Ganpat, if any. That relief he must seek on the execution side and not in the suit, or by way of appeal. The dismissal of the suit so far as it sought recovery of the amount from the defendant Hydar Ali personally, was proper and it must stand.

But all the same, I think the plaintiff's claim could not be altogether dismissed. The relief by way of the enforcement of the statutory charge for the unpaid purchase-money could not be denied to him. It was secured to him by the provisions of S. 55 (4) (b), Transfer of Property Act. It could not be defeated by the personal undertaking; on the contrary the undertaking was by way a further assurance of the fulfilment of the statutory charge thus created. But this charge is limited in its nature. It enures in favour of the unpaid vendee's assignee also and consequently the plaintiff could treat his sale as operative only on his vendor's lien for the unpaid purchase-money, to the extent of the amount paid by him and its interest. I therefore hold that plaintiff could recover Rs. 500 + Rs. 960 total Rs. 1,460, with interest thereon from the estate conveyed to Hydar Ali by Ganpat. I think he is not entitled to the costs of the previous litigation, as it does not come within the strict letter of the law. As regards the rate of interest I think 9 % per annum is a reasonable rate to be allowed in the circumstances of the case.

I therefore reverse the decree of the Court below and direct that a decree awarding Rs. 1,450 + interest thereon from the date on which it was paid up to the date of this Court's decree at 6 % per annum with proportionate costs in all three Courts be passed in plaintiff's favour and that the same be realized by the sale of the house conveyed to Hydar Ali by Ganpat. The decree shall carry future interest at the same rate until actual realization.

R.K.

Decree reversed.

* A. I. R. 1927 Nagpur 333

PRIDEAUX, A. J. C.

Rao Sobhag Singh—Applicant.

v.

Thakur Bakhtawarsingh—Non-applicant.

Cr. Rev. No. 89 of 1924, Decided on 28th April 1924, from the order of the Sub-Divisional Magistrate, Khandwa, D/- 22nd December 1923.

* *Criminal P. C., S. 145—Offerings made to shrines in temples are not "profits" within S. 145.*

Offerings made by pilgrims at the shrine do not come within the definition of "profits" in S. 145. Where the dispute relates merely to offerings made, then the dispute is about moveable property, and a declaration under S. 145, Criminal P. C., that one of the parties is in possession of such offerings is an order made without jurisdiction: 37 Cal. 578 and 38 Cal. 387, Ref. [P 334 C 1,2]

M. Gupta—for Applicant.

H. S. Gour—for Non-applicant.

Judgment.—There is a temple dedicated to Shri Onkarji at Mandhata. It is visited by Hindus from all parts of the country and they make offerings at the shrine. The offerings are taken by the Raja of Mandhata, the present applicant. One Thakur Bakhtawar Singh, the non-applicant, applied to the First Class Magistrate as follows:

I have been enjoying the 8 annas income of the entire temple of Shri "Onkarji" for the last several generations for:

- (1) Kartik Sudi 11 to 14;
- (2) Mahashivratri 1 day; and
- (3) Baisakh Sudi 12 to 14, day and night for eight days. This settlement was arrived at between our ancestors and the ancestors of the Raja of Mandhata Now the Raja Sahib protests against this right of mine to enjoy the profits of the temple for these eight days every year and this year too. Now the

Raja Sahib tells me that I have a right to enjoy only half the income of the offerings made by pilgrims and to the goddess Parwati in this temple. Our agents have since this morning been sitting to watch this income. This income is to be divided in the near future. As Raja Sahib is protesting this payment, there is likely to be a breach of the peace in the division of my income in the near future. I therefore pray that action be taken, both to safeguard my interests and to save the intended breach of the peace. This question of right is settled by the District Judge and therefore cannot be opened again.

On this application an order was passed directing that the moiety of the income which the Court had collected be given to the applicant Bakhtawar Singh, and that the other half be given to the Raja of Mandhata. Against that order the present revision application is filed.

Section 145, Criminal P. C., lays down that whenever a Magistrate of the 1st Class is satisfied from a police report or other information that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof, within the local limits of his jurisdiction, he shall make an order in writing; and that for the purpose of this section the expression "land or water" includes buildings, markets, fisheries, crops or other produce of land, and the rents or profits of any such property. The question for decision is whether offerings made by pilgrims at the shrine come within the definition of "profits" of the section. The District Magistrate is unable to support the order of the 1st Class Magistrate.

It is argued for the non-applicant that the real dispute is with regard to the temple and that, therefore, S. 145 is applicable. It is clear from the proceedings that this is not the case. The dispute is with regard to the division of the offerings made to the temple. The cases quoted for the non-applicant, viz., *The Collector of Thana v. Krishnanath Govind* (1) and *In re Muthusami Pillai* (2), are not to the point. It has been settled by the Calcutta High Court that offerings given by worshippers to any deity are not profits arising out of a building; that they arise out of deity irrespective of the building or the land upon which he may happen to dwell; and that to hold otherwise would be to allow the criminal

Courts to interfere with the customary laws of this country. It seems to me that where the dispute relates merely to offerings made, then the dispute is about moveable property, and that declaration under S. 145, Criminal P. C., that one of the parties is in possession of such offerings, is an order made without jurisdiction: see *Guiram Ghosal v. Lal Behari Das* (3) and *Ram Saran Pathak v. Raghu Nandan Gir* (4).

As the Magistrate's order is without jurisdiction, I set it aside.

D.D.

Order set aside.

(3) [1910] 37 Cal. 578=14 C. W. N. 611=6 I. C. 182=11 C. L. J. 292.

(4) [1910] 38 Cal. 387=16 C. W. N. 574=9 I. C. 6=13 C. L. J. 445.

* A. I. R. 1927 Nagpur 334

KOTVAL, A. J. C.

Abdul Kayum—Defendant—Appellant.
v.

Mojiram and another—Plaintiffs—Respondents.

S. A. No. 503 of 1925, Decided on 29th June 1927, from the decision of the Dist. Judge, Hoshangabad, D/-30th September 1925, in Civil Reg. Appeal No. 63 of 1925.

* *Easements Act, S. 15*—Acts referable to ownership cannot be basis for claim to easement.

Acts done during the statutory period which are only referable to a purported character of owner cannot validate a subsequent claim to an easement. [P 335 C 2]

An easement is a restriction in favour of one owner or occupier of immovable property of the rights of ownership of the immovable property of another owner. The restriction cannot be built up or asserted without consciousness of the rights which are restricted. If the right that a person is exercising is not with the consciousness that he is restricting another person's rights of ownership, he cannot be enjoying a right of easement: *Lyell v. Holfield* (1914) 3 K. B. 911, Foll. [P 335 C 2]

J. Sen—for Appellant.

A. V. Khare—for Respondents.

Judgment.—This appeal arises out of a suit brought on the 9th April 1925 for a declaration that the plaintiffs had a right of way for certain purposes over a lane which lay between the plaintiffs' and the defendant's houses, and the right to have rain and waste water from plaintiffs' house pass into the lane, and for a perpetual injunction restraining the

(1) [1880] 5 Bom. 322.

(2) 2 Weir. 112.

defendant from obstructing the way or the passage of the water. The trial Court held it proved that the rights claimed were enjoyed for twenty years as of right and without interruption but dismissed the suit as it found that the period of enjoyment ended more than two years before the institution of the suit. The lower appellate Court differing from the finding last mentioned decreed the suit. The defendant appeals.

A number of pleas were raised in the lower Courts, but in my opinion the plaintiffs' suit must fail on the ground discussed below.

In 1921 the plaintiffs had filed a suit for possession of the lane in dispute alleging themselves to be owners thereof. The suit was dismissed, the plaintiffs having failed to establish their title. An appeal and a second appeal were unsuccessful. On the strength of certain remarks by the lower Courts as to common user an attempt was made in the second appellate Court to have the suit converted by amendment into one to enforce an easement. The Court refused to allow this to be done. The present suit was then brought.

One of the defendant's pleas was that the plaintiffs having all along purported to use the land as owners no easement could be acquired. The trial Court appears to have been of the opinion that it was immaterial that the plaintiffs purported to use the land as owners and that it was sufficient that they were never in fact owners. The lower appellate Court on this point observes :

The fact that there was a claim of a higher right of ownership does not prevent the plaintiffs from acquiring the lesser rights of enjoyment over the land in question for the benefit of another land belonging to them. A prescriptive right of easement would be acquired even if the plaintiffs mistakenly supposed that they were the owners of the land and asserted that they gained the ownership by prescription : 38 *Madras*: p. 1.

Konda Reddi v. Ramasami Reddi (1) has, since the date of the learned District Judge's judgment been overruled in *Suba Rao v. Lakshmana Rao* (2), where it was observed as below :

It is clear that a man is not finally precluded from claiming the benefit of an easement merely because in the course of legal proceedings he made an unfounded claim to be owner,

however strongly the making of such a claim might weigh against him. The learned Judges in *Konda Reddi v. Ramasami Reddi* (1) seem to imply that the assertion of ownership during the period of user is not fatal to the success of a claim to an easement. To this proposition we cannot assent. Our opinion is that while the mere putting forward of a wider claim in legal proceedings is not conclusive against a right of easement, yet the question *quo animo egerit* to what purported character are the acts of user to be ascribed, is one which the Court must answer, and if *Konda Reddi v. Ramasami Reddi* (1) implies the contrary we think it is wrongly decided. We agree with the conclusion of Shearman J. in *Lyell v. Hothfield* (3) that acts done during the statutory period which are only referable to a purported character of owner cannot validate a subsequent claim to an easement.

So far as the easements with which we are concerned in this suit the material part of S. 15, Easements Act, is as follows :

Where a right of way or any other easement has been peaceably and openly enjoyed by any person claiming title thereto, as an easement, and as of right, without interruption and for twenty years, the right to such easement shall be absolute.

The words "as an easement" clearly indicate that the right must be enjoyed by a person in his capacity as an owner of certain land (called dominant heritage) for the beneficial enjoyment of that land over certain other land not his own (called the servient heritage.)

Their Lordships of the Privy Council in *Attorney-General for Nigeria v. John Holt and Co., Ltd.* (4), says :

An easement, however, is constituted over a servient tenement in favour of a dominant tenement. In substance the owner of the dominant tenement throughout admits that the property is another's and that the right being built up or asserted is the right over the property of that other.

An easement is a restriction in favour of one owner or occupier of immovable property of the rights of ownership of the immovable property of another owner. The restriction cannot be built up or asserted without consciousness of the rights which are restricted. If the right that a person is exercising is not with the consciousness that he is restricting another person's rights of ownership he cannot be enjoying a right of easement. Whether the plaintiffs were enjoying the rights claimed "as easement" or as rights of ownership depends upon what they were intending to do.

(1) [1915] 38 *Mad.* 1=17 *I. C.* 112=6 *M. L. W.* 564.

(2) *A. I. R.* 1926 *Mad.* 728=49 *Mad.* 820 (*F. B.*).

(3) [1914] 3 *K. B.* 911=84 *L. J. K. B.* 251=30 *T. L. R.* 630.

(4) [1915] *A. C.* 599=112 *L. T.* 955.

The question of the animus of the plaintiffs, therefore, requires determination. It is clear in the present case that the plaintiffs always purported to exercise rights of ownership over the lane and not of easement. They asserted and brought evidence in support of their claim of ownership in the suit of 1921 and pressed it in second appeal in 1924. Even in their plaint in the present suit after describing in para. 2 in what ways they have been using the lane for many years they state that as a matter of fact they had been the owners of the lane. The plan attached to the plaint describes the lane as the plaintiffs'. As P. W. 1 Mojiram, one of the plaintiffs states :

When I built the house I left this space (lane in suit) out of my land for my use. I used the land in suit as owner.

It is clear that the plaintiffs purported to use the lane by right of ownership and not to exercise rights over another person's land. They never admitted in substance that the lane was the defendant's and that the right they were asserting was a right over the defendant's property.

The suit must, therefore, fail. The decree of the lower appellate Court is set aside and that of the trial Court restored. Costs throughout will be paid by the plaintiffs.

D.D.

Suit dismissed.

* A. I. R. 1927 Nagpur 336

KINKHEDE, A. J. C.

Jambudas—Applicant.

v.

Income Tax Commissioner, C. P.—Non-Applicant.

Misc. Jud. Case No. 44-B of 1926, Decided on 15th July 1927, from the order of the Income-Tax Commr., D/- 23rd September 1926.

* *Income-tax Act (1922), S. 66 — Inference from facts is question of law — Entries in assessee's books — Presumption is that they are made in due course and not to conceal the income.*

The proper legal effect of proved facts is a question of law : 46 Cal. 189, Foll. [P 336 C 2]

The normal presumption is in favour of good faith and not of bad faith on the part of the assessee. He is, therefore, entitled to ask the Crown to start with a presumption that an entry in the account books is made in the ordinary course and with no intention to conceal the income, and that it is for the Crown to prove the contrary. [P 336 C 2]

*W. R. Puranik—for Applicant.**G. P. Dick—for Non-Applicant.*

Order.—The question whether the applicant has been rightly found to have concealed his income from the Income-tax Department depends upon the decision of the question whether or not on the facts found the inference of concealment could be based. The proper legal effect of proved facts is a question of law as held by their Lordships of the Privy Council in *Nafar Chandra Pal v. Shukur* (1). Moreover the Income-tax Department must always bear in mind that the normal presumption is in favour of good faith and not of bad faith on the part of the assessee. The applicant was, therefore, entitled to ask the Crown to start with a presumption that the entry in the Ravana Khata Akola was made in the ordinary course and with no intention to conceal the income, and that it was for the Crown to prove the contrary. Suffice it to say at this stage that as the learned Commissioner does not seem to have approached the case from the right point of view of burden of proof, there is likelihood of the conclusions drawn by him being vitiated for want of proper appreciation of facts or for misapplication of the law to them. This Court can always test the soundness in point of law of the conclusions drawn from proved facts. I am satisfied that the case involved questions of law on which the Commissioner could be compelled to make a reference to this Court. The pleader's fee Rs. 50. The non-applicant shall pay applicant's costs.

R.K.

Order accordingly.

(1) A.I.R. 1918 P.C. 92=46 Cal. 189=45 I.A. 183 (P.C.).

* A. I. R. 1927 Nagpur 337

FINDLAY, J. C., AND MACNAIR, A. J. C.

Deoba—Defendant—Appellant.

v.

Babaia—Plaintiff—Respondent.

F. A. No. 52-B. of 1925, Decided on 12th July 1927, against the decree of the Addl. Dist. Judge, Yeotmal, D/- 31st March 1925, in Civil Suit No. 4 of 1923.

* *Hindu Law—Son's Liability—Torts committed by father—Liability extends to the benefit received by the estate—Tort.*

A Hindu son can be held liable for torts committed by his father during the latter's life-time only to the extent to which the family estate has been benefited: *Phillips v. Homfrey* (1883) 24 Ch. D. 439, *Foll.*; (Case law considered.)

[P. 338, C. 1]

Such liability does not amount to a debt which he is bound to discharge, and is distinct from obligations legally incurred in consequence of a contract or quasi-contract. [P. 338, C. 1]

B. K. Bose, V. Bose and P. N. Rudra—for Appellant.

A. V. Khare—for Respondent.

Opinion

The order of reference, dated the 12th March 1926, was made by one of the Judges on this Bench. The question on which he desired the opinion of a Bench is this:

Can a Hindu son be held liable for torts committed by his father during the latter's lifetime, even if these torts resulted in no benefit to the joint estate?

The appellant urges that this question must be decided in the negative, and relies on *Shrawan v. Bhiwa* (1); *Pareman Dass v. Bhattu Mahton* (2); *Durbar Khachar v. Khachar Harsur* (3); *Haridas Ramdas v. Ramdas Mathuradas* (4); and *Panna Lal Ghose v. The Adjai Coal Co., Ltd.* (5). The respondent takes up the position that a son is liable for the torts committed by his father as commission of such torts amounts to the incurring of a debt. There is no question in the present case of the tort involving such illegality or immorality that the son would not be liable.

We will now refer to the cases on which the respondent relies. In *Chhakrauri Mahton v. Ganga Prasad* (6) a decree was in existence against the

father before his death, and it was allowed to be executed against the son. The basis of the decision in *Venkatacharyulu v. Mohana Panda* (7) is that sons are liable upon contracts or quasi-contracts entered into by their father or upon similar other obligations legally incurred. In *Garuda Sanyasayya v. Nerella Murthenna* (8) Wallis, C. J., and Aiyar, J., held that a Hindu son was liable to account for amounts collected by his father and grandfather in their capacity as trustees, but subsequently misappropriated by them. Here a criminal liability was concerned, but there was breach of an obligation of a contractual nature. The decision in *Venkatakrishnayya v. Kundurthi Byragi* (9) is to the same effect. In *Hanmant Kashinath v. Ganesh Annaji* (10) a money decree was in existence against the father before his death in respect of his breach of duty as a trustee.

On the general question of what modification can be allowed of the maxim *actio personal moritur cum persona*, the law applicable seems to us to have been happily expressed by Bowen, L. J., in *Phillips v. Homfrey* (11) in the following terms:

The only cases in which apart from the question of breach of contract, express or implied, a remedy for a wrongful act can be pursued against the estate of a deceased person who has done the act, appear to us to be those in which property or the proceeds or value of property, belonging to another, have been appropriated by the deceased person and added to his own estate or moneys. In such cases, whatever the original form of action, it is in substance brought to recover property or its proceeds or value and by amendment could be made such in form as well as in substance. In such cases the action, though arising out of a wrongful act, does not die with the person. The property or the proceeds or value which in the lifetime of the wrongdoer could have been recovered from him can be traced after his death to his assets and re-captured by the rightful owner there. But it is not every wrongful act by which a wrongdoer indirectly benefits that falls under this head, if the benefit does not consist in the acquisition of property or its proceeds or value. Where there is nothing among the assets of the deceased that in law or in equity belongs to the plaintiff and the damages which have been done to him are unliquidated and uncertain, the executors of a

(1) [1903] 16 C. P. L. R. 65.

(2) [1897] 24 Cal. 672.

(3) [1903] 32 Bom. 348=10 Bom. L. R. 297.

(4) [1889] 13 Bom. 677.

(5) A. I. R. 1927 Cal. 117.

(6) [1912] 39 Cal. 862=15 C. L. J. 228=12 I. C. 609=16 C. W. N. 519.

(7) A. I. R. 1921 Mad. 407=44 Mad. 214.

(8) [1918] 35 M. L. J. 661=48 I. C. 740=9 M. L. W. 1.

(9) A. I. R. 1926 Mad. 535.

(10) [1919] 43 Bom. 612=51 I. C. 612=21 Bom. L. R. 435.

(11) [1883] 24 Ch. D. 439=52 L. J. Ch. 833=49 L. T. 5=32 W. R. 6.

wrongdoer cannot be sued merely because it was worth the wrongdoer's while to commit the act which is complained of, and an indirect benefit may have been reaped thereby.

As long as the maxim *actio personal moritur cum persona* is preserved by the law of this country, the line drawn is neither inconvenient nor unreasonable. If every wrongful act which was attended consequently and indirectly with advantage to the wrongdoer or his pocket were to warrant an action against executors, it would be impossible to know when executors were liable or not and the maxim would in fact, become a mere source of litigation. We have not now to consider the policy of the maxim. It is part of the law and, while it is so, ought not to be frittered away.

In our opinion, there is nothing in the cases on which the respondent relies which supports the theory that the present defendant-appellant is responsible for the wrongful act of his father on the ground that the result of these wrongful acts, in fact, amounted to a debt which he was bound to discharge. No decree was in existence against the father before his death. We are considering the liability of a Hindu son for torts committed by his father, not for obligations legally incurred in consequence of a contract or quasi-contract. We, therefore, think that the rule laid down by Bowen, L. J., applied, although we are dealing with a Hindu father and son. Our opinion on the question submitted is, therefore, that the son can be held liable for torts committed by his father during the latter's lifetime only to the extent to which the family estate has been benefited.

[After the opinion of the Bench the appeal was heard by Mr. Findlay J. C., and was remanded for a finding on the question whether the family estate benefited by the tortious act.]

R.K.

Case remanded.

A. I. R. 1927 Nagpur 338

FINDLAY, J. C.

Kisan—Plaintiff—Appellant.

v.

Sitaram and others — Defendants—Respondents.

F. A. No. 31 of 1926, Decided on 24th June 1927, from the decree of the 1st Class Sub-Judge, Nagpur, D/- 17th March 1924, in Civil Suit No. 3 of 1924.

(a) *Usurious Loans Act*, S. 2 (3)—Act is not retrospective.

The Act does not apply to mortgage deeds executed before the commencement of the Act.

[P 338, C 2]

(b) *Contract Act*, S. 74—Compound interest, instead of simple interest, at original rate is not penal.

A mere stipulation for compound, instead of simple, interest at the original rate cannot be described as increased interest, and such a stipulation is not in the nature of a penalty 25 All. 159 and 31 Cal. 138, *Foll.*

[P 338, C 2; P 339, C

W. R. Puranik—for Appellant.

R. K. Manohar—for Respondents 1 & 2.

Judgment.—The facts of this case are sufficiently clear from the lower Court's judgment. The plaintiff Kisan has come up here on appeal with regard to the disallowance by the Subordinate Judge of compound interest. Very obviously, the Subordinate Judge erred in supposing that he was at liberty to apply the provisions of the Usurious Loans Act, 1918, to the facts of the present case. The mortgage-deed in suit was executed in 1908 and the present suit cannot be described as a "suit to which this Act applies" under S. 3 of the said Act.

The only question which remains, therefore, is whether, in the circumstances of the present case, this Court is entitled to give relief to the respondent under S. 74, Indian Contract Act. *Prima facie*, as shown by the Subordinate Judge, there would be a strong case in equity for giving relief in view of the grossly swollen nature of the claim, in which the interest claimed amounts to some 11 times the original principal, and also in view of the fact that the plaintiff had delayed so long in bringing his suit. The actual provision as regards interest in the mortgage-deed in suit is that it was to run at the simple rate of Re. 1-8-0 per mensem and repayment of the amount due under the mortgage was to be made within five years. If the mortgagor failed to make such repayment, then compound interest was to be charged. In *Janki Das v. Ahmad Husain Khan* (1) and in *Prayag Kapri v. Shayam Lal* (2) the learned Judges respectively concerned took the view that such a stipulation as we are concerned with here is not in the nature of a penalty; and it is difficult to see how, in view of the terms of the explanation to S. 74, Contract Act, it could be possible to hold that a mere stipulation for compound instead of simple interest at the original

(1) [1902] 25 All. 159—(1902) A. W. N. 218.

(2) [1904] 31 Cal. 138.

rate can be described as increased interest. There has been no proof or, indeed, specific plea, that in the present case the creditor was in a position to dominate the will of the borrower or that the latter did not understand the perfectly simple terms included in the deed in suit as regards interest. With respect, therefore, in view of the exaggerated amount of interest which the plaintiff would appear to be entitled to claim in the present case, I am forced to the conclusion that it is not open to me to give relief to the respondent in this matter of interest and I hold that from 2nd September 1913 up to date of suit appellant is entitled to compound interest with yearly rests at the contract rate of Re. 1-8-0 per cent. per mensem. A decree will be drawn up accordingly in supersession of that passed by the lower Court. The case, however, is one in which, from an equitable point of view, the defendant-respondent is certainly entitled to any relief which it is within the power of the Courts to give him, and the only method in which I can give such relief, and that only to a limited extent, is by ordering the parties to bear their own costs incurred in both Courts. A provision to this effect will be included in the decree which will be drawn up under O. 34, R. 4 (1), Civil P. C., in accordance with this judgment. I allow six months time for payment from date of decree, but I see no reason to allow interest pendente lite or future interest.

R.K.

Decree modified.

A. I. R. 1927 Nagpur 339

KOTVAL, A. J. C.

Abdul Aziz and others—Defendants—Appellants.

v.

Deorao and others—Plaintiffs—Respondents.

S. A. No. 391-B of 1925, Decided on 2nd July 1927, from the decision of the Addl. Dist. Judge, Amraoti, D/- 19th August 1925.

Highway—Music.

Public have right to conduct religious processions with music through a public street: *A.I.R.* 1925 P. C. 36, *Rel. on.*; 42, *Bom.* 438, held no longer good law. [P 340, C 2]

M. Y. Sharif—for Appellants.

M. R. Pathak—for Respondents.

Judgment.—The plaintiffs and defendants represent the Hindu and Mussalman residents of the village Murha Buzrug. The plaintiffs alleged that it was an ancient custom of theirs to take every year on stated occasions religious processions accompanied by music along certain public roads, but that the defendants obstruct these processions at a certain place on their route, where they allege that a masjid of theirs is situated; that on account of such obstruction the police have on several occasions prevented them from taking their processions with music by that place. The plaintiffs allege that what the defendants state is a masjid is only a takia or public cemetery and that even if it is a masjid the defendants have no right to obstruct the processions. Alleging that the obstruction is an infringement of their right, they pray for a declaration of their rights and a perpetual injunction to the defendants not to obstruct the processions.

The defendants denied that the processions were ever taken by any road near masjid, that in accordance with a long-standing practice in Berar which had acquired the force of law no music of any kind whatsoever was played in front or on any side of a masjid by the Hindus on any festival, that this practice was always observed in respect of the masjid in Murha Buzrug, that the existence of the mosque by itself was a sufficient ground for stopping the music in front or on the sides of it and that no suit could be maintained against them because of the preventive action taken by the police in the interests of public peace and order.

The trial Court found that the premises alleged by the defendants to be a masjid were originally only a takia, but were only recently claimed to be or converted into a masjid, that the plaintiffs from time immemorial took processions with music on the occasions and by routes stated by them, and that there was no practice in Berar of stopping music in front of masjids. It granted an injunction as prayed. The lower appellate Court confirmed these findings and dismissed the defendants' appeal.

In this Court only two points have been argued. The first is with reference to Ex. 1 D. 3. This document is a copy of order dated the 16th June 1921 in a criminal case by which five Hindus, of

whom one was Deorao, plaintiff 1, in this suit, were bound over under S. 107, Criminal P. C., to keep the peace for a year. The allegations found to be proved in that case were that a Hindu procession carrying the dead body of a Sadhu passed the masjid without stopping the music in front of it on the 19th January 1921 and that since that time there was ill-feeling between the Hindus named above and some Mahomedan residents of the village which was likely to result in a breach of the peace. Reference is made in the order to a kararnama (marked Ex. P-1 in that case). All that is said in the Magistrates' order about this kararnama is the following :

In the year 1914 there was dispute in connexion with stopping baja in front of the masjid. The leaders on both sides passed agreement and amicably settled the dispute. The kararnama is filed Ex. P-1. According to this kararnama the music was stopped in front of the masjid.

This kararnama has not been produced in the present case and other evidence of its contents, it is admitted here, is produced. The learned counsel for the appellants submits that the order (Ex. 1 D. 3) proves that the Hindus agreed to be bound not to play music near the masjid. The Magistrate's order does not, in my opinion, suffice to prove the claim to stop the music as made in this suit. But in any case no foundation is laid for using it as secondary evidence of the contents of the kararnama. The kararnama was presumably in the possession of the Mussalmans and its loss is not proved. The lower appellate Court was therefore right in not placing any reliance on the order in proof of the agreement. The first point fails.

The second point urged is the wide proposition that no member of the public has the right to go on a public road playing music of any kind whether the music causes annoyance or not to any other member. *Venkatesh Appashet v. Abdul Kadar* (1) is relied on in support of this proposition. The authority of that ruling, however, is shaken by the later Privy Council ruling, *Manzur Hasan v. Muhammad Zaman* (2). In the case last mentioned the Shiah community were granted against the Sunni community of their town a declaration that the

former had the right to go in procession and perform matam in a public thoroughfare at the back of a masjid used by the Sunni community. The right to conduct religious processions with its appropriate observances through a public street, subject to certain conditions, was affirmed. A distinction is sought to be made on the ground that the case was one concerning performance of matam and the playing of music. That circumstance, however, makes no difference. Both matam and music are equally concomitants of religious processions and the objection to both is the same, namely that they disturb devotions in the masjid. This point also fails.

The appeal is dismissed with costs.

R.K.

Appeal dismissed.

A. I. R. 1927 Nagpur 340

FINDLAY, J. C.

Mt. Guniabai—Plaintiff—Applicant.

v.

Shankerrao and others—Defendants—Non-applicants.

Civ. Rev. No. 355 of 1926, Decided on 28th June 1927 from the order of the Addl. Dist. Judge, Nagpur, D/- 2nd September 1926, in Misc. Judicial Case No. 52 of 1924.

(a) *Civil P. C.*, S. 115—*Pauper*—*Civil P. C.*, O. 33, R. 1.

Revision lies from an order rejecting application to be allowed to sue as a pauper: *A. I. R. 1924 Nag. 44* and *1925 Nag. 343*, *Foll. A. I. R. 1926 All. 446*, *not Foll.*

But High Court will not interfere in this class of cases unless there is some material irregularity or illegality in the lower Court's procedure even if on the evidence in question it were itself disposed to take a different view of questions of fact involved. [P 341, C 1]

(b) *Civil P. C.*, O. 33, R. 1, *Expl.*—*Onus to prove pauperism lies on the applicant.*

Under O. 33, *Civil P. C.*, the onus of proving that a person is a pauper within the meaning of the explanation to R. 1, lies heavily on the applicant: *10 All. 467*, *not Appr.* [P 341, C 2]

M. R. Bobde—for Applicant.

W. R. Puranik and S. A. Ghadgay—for Non-applicant.

Order.—This is an application by *Mt. Guniabai* against an order of the Additional District Judge, Nagpur, rejecting her application to be allowed to sue as a pauper. The suit in question

(1) [1918] 42 Bom. 438=46 I. C. 740=20 Bom. L. R. 667.

(2) *A. I. R. 1925 P. C. 36*=47 *All. 151*=52 *I. A. 61* (P. C.).

was one for partition and the Court-fee ordinarily payable would be Rs. 976-6-0.

In the first place an objection has been taken by the pleader for non-applicants 1, 3 and 4 to the effect that no revision lies in the case, and the decision in *Shankar Ban v. Ram Deo* (1), has been quoted in support of this position. For my own part, I fully concur, on the contrary, in the decision in *Achalsingh v. D. B. Seth Jiwandas* (2), as well as in *Ramchandra v. Gajrabai* (3). This Court, however, will not interfere in this class of cases unless there is some material irregularity or illegality in the lower Court's procedure. Even if this Court, on the evidence in question, were itself disposed to take a different view of questions of fact involved, this cannot authorize interference in revision. On this view of matters only two questions, which may, by any stretch of reasoning, be deemed to raise legal points, can be said to arise in the present case.

It has, first of all, been urged that the non-applicant Shankarrao was ordered in this case to produce a partition-deed, and failed to do so. It is clear from his evidence as N. A. W. No. 7 that his story in this connexion is that he made a search for the deed of partition and could not find it. I have been asked by the applicant's pleader to reject this story and to hold that the non-applicant Shankarrao has suppressed this partition-deed as well as to presume that, if it had been produced, it would have supported the present applicant's story of her pauperism. In ordinary circumstances, I should certainly have felt compelled to make some presumption in favour of the applicant in this connexion, but there are special facts in the evidence in the present case which, in my opinion, disentitle me from doing so. Non-applicant 2, Ramchandrarao, who is only a formal party, and who is, indeed, alleged by other non-applicants to be behind the applicant in her present application and in the suit she desires to file, is obviously at loggerheads with the other non-applicants and, in particular, with Shankarrao. It is significant that Ramchandrarao did not go into the witness-box, and Shankarrao's evidence goes to show that the deeds of partition

were executed in duplicate, Ramchandrarao retaining one and Shankarrao the other. There is also other evidence which shows that the present applicant sides with and often resides with the non-applicant Ramchandrarao. I have not, therefore, the slightest doubt but that, if she had really been anxious to produce in the evidence the deed of partition, she could easily have arranged for the production of the copy in Ramchandrarao's possession. In the circumstances of this case, therefore, I am not prepared to draw any presumption against the contesting non-applicants from the fact that Shankarrao did not produce the deed of partition in question.

I have also been referred by the pleader for the applicant to a decision of Mahmood, J., in *Muhamad Husain v. Ajudhia Prasad* (4). In that judgment, certain remarks are made which would tend to approve of a peculiarly lenient standard of proof being laid down in the case of an applicant like the present who desires to file a suit in forma pauperis. It is difficult to lay down any general rule in such a matter, but with all respect for the learned Judge in question it seems to me that, under the rules contained in O. 33, Civil P. C., the onus of proving that a person is a pauper within the meaning of the explanation to R. 1 *idem*, clearly lies heavily on the applicant in question. The non-applicants in such a case are in no easy position because what they have to prove is in reality a negative and it is no matter for them to prove the property in the applicant's possession, a matter of which the latter must necessarily have special means of knowledge. In any event, I cannot, however, see that the District Judge has in any way erred legally in this connexion. In a question of fact like the one we are concerned with in the present case, many of the conclusions must necessarily be largely arrived at on the inferences arising naturally from the evidence. In this connexion I agree with the Judge of the lower Court that the oral evidence produced in support of the applicant is far from satisfactory. On the other hand the non-applicants have produced oral evidence which goes to show that the applicant engages in money-lending, and I may add that the story of the sale of ornaments by the

(1) A. I. R. 1926 All. 446=48 All. 493.

(2) A. I. R. 1924 Nag. 44=19 N. L. R. 165.

(3) A. I. R. 1925 Nag. 343.

(4) [1888] 10 All. 467=(1888) A. W. N. 179.

applicant strikes me as a very cock-and-bull one. Considering the applicant's story and the position in life of her husband, all the probabilities are against the story of her alleged pauperism and the present suit seems only one of a class too common in this country where a dishonest attempt is made by a person, who could easily find the Court-fee necessary, to file a suit as a pauper with the mere object, of, so to speak, litigating cheaply. There is little to lose, and possibly much to gain, by such an attempt.

I can find no ground, therefore, which would justify interference in revision with the order of the lower Court and I dismiss the present application. The applicant must bear non-applicants 1, 3 and 4's costs. Costs in the lower Court as already ordered. There will be only one set of pleader's fees which I fix at Rs. 50. Non-applicants 2 and 5 will bear costs in this Court.

R.K. *Application dismissed.*

A. I. R. 1927 Nagpur 342

FINDLAY, J. C.

Raje Udaram Balwant Rao—Plaintiff—Appellant.

v

Wallu and others—Defendants—Respondents.

S. A. No. 187-B of 1926, Decided on 12th July 1927, from the decree of the Addl. Dist. Judge, Yeotmal, D/- 2nd January 1926, in Civil Appeal No. 48 of 1925.

(a) *Registration Act, S. 49—Unregistered sale deed can be used to prove nature of vendee's possession.*

An unregistered sale-deed, although not admissible to prove the function of sale, is admissible to prove the nature or quality of vendee's possession: A. I. R. 1919 P. C., 44, *Foll.*

[P 343 C 1]

(b) *Berar Alienated Villages Tenancy Law (1921), S. 47—Continuous possession—Vendee (by unregistered deed) in possession since 1900—His vendor in possession from 1894 — Both possessions can be tacked.*

A person in continuous possession of a field since his purchase by an unregistered deed from a prior tenant who was cultivating from 1894 can tack his vendor's possession to that of his own. Such person is a tenant who by himself or through his predecessor-in-title has been cultivating since before 1895.

[P 343 C 1]

M. R. Bobde—for Appellant.

S. C. Datta Chaudhri—for Respondents.

Judgment.—The plaintiff-appellant Raje Udaram Balwant Rao sued the defendants-respondents Wallu Jairam and Hupsingh for a declaration that they were not permanent tenants of fields 4/1 and 76/1 in mouza Moha, of which they have been recorded as such. His case was that one Pitamber was cultivating all field 4 from 1888 to 1893, that Hirya Mahar cultivated it from 1894 to 1898, and that it was given for cultivation to defendant 1, Wallu, in 1899. As regard field 76/1, Ukandya cultivated it from 1888 to 1898 and Wallu has been cultivating it since 1899 only.

Defendants' case as regard field 4 was that Hirya cultivated it from 1893 to 1899, but Wallu had been his partner in cultivation during these years; that on 6th March 1900 Hirya sold the northern half of the field, i. e., No. 4/1 now in suit, to Wallu by an unregistered sale-deed, and that Wallu has been in continuous possession thereof ever since. As regards field 76, Ukandya had cultivated it before 1894, in which year he gave half of it viz., No. 76/1, to Wallu to cultivate and the latter has held it ever since. We are not concerned in this appeal with field 76/1.

On the issues which arose on these pleadings the Subordinate Judge came to the following findings:

(a) that it had not been proved that Wallu only commenced to cultivate 4/1 from 1899 onwards;

(b) that Hirya had transferred field 4/1 to Wallu as alleged by defendants.

Plaintiff not being held to have proved that he only leased field 4/1 to defendant 1 in 1899, the Subordinate Judge was of opinion that he came into possession of the field before 1899, it being sold to him by Hirya and he thus acquired title from him.

Plaintiff appealed to the Court of the Additional District Judge, Yeotmal, as regards the dismissal of his claim with reference to field 4/1. The Additional District Judge held that the sale in Wallu's favour had been proved, that plaintiff had acquiesced in the tenancy being held by Wallu who was, therefore, entitled to tack on Hirya's possession to his own, and, as that admittedly went back as far as 1894, Wallu must be held to have complied with the requirement of continuous possession since before the 1st June 1895 laid down in S. 47,

Berar Alienated Villages Tenancy Law, 1921.

The main question involved in the present appeal by the plaintiff is as to whether the lower appellate Court was correct in tacking on Hirya's possession to that of Wallu. Mention has been made of an obvious mistake made by the Additional District Judge when he says Ukandya was Wallu's predecessor-in-title. Very clearly this was a slip of the pen for "Hirya": Ukandya was concerned only with field 76/1. This so-called misappreciation of the evidence is of no importance whatever.

It has been urged, however, that before the law of 1921 came into force, the tenant could have been turned out yearly and that in these circumstances Hirya could give no greater right of tenancy than he possessed himself. That is in terms true, but the facts here are that the tenant was not so turned out and that after the sale to Wallu, the landlord allowed him to continue in possession.

The case, therefore, depends on whether the sale in Wallu's favour by Hirya is established. I do not see that there exists any doubt as to the identity of the plot purported to have been sold, and there is oral evidence as to the factum of the sale: cf. deposition of P. W. 2, Sambhaji. Moreover, the sale deed, although not admissible to prove the function of sale, is admissible to prove the nature or quality of Wallu's possession: cf. *Varada Pillai v. Jeevarthnammal* (1). Taking all these circumstances, I think there was sufficient evidence to justify the finding of fact arrived at by the lower appellate Court and it follows that, there being no evidence of the alleged fresh lease for the first time in 1899, plaintiff must be held to have acquiesced in the tenancy passing from Hirya to Wallu. It follows that defendants-respondents must be held to be tenants who by themselves or through their predecessors-in-title have been cultivating the plot since before the 1st June 1895. I am of opinion, therefore, that the decree of the lower appellate Court is correct. The appeal is accordingly dismissed. Appellant to bear the respondents' costs.

R.K.

Appeal dismissed.

A. I. R. 1927 Nagpur 343]

KINKHEDE, A. J. C.

Mt. Amritibai—Plaintiff—Applicant.
v.

Ratanlal and others—Defendants—Non-Applicants.

Civ. Rev. No. 17-B of 1927, Decided on 11th July 1927, from the order of the 1st Class Sub-Judge, No. 1, Akola, D/- 13th December 1926, in Civil Suit No. 18 of 1924.

(a) *Limitation Act, Art. 176*—Two rival claimants—Application of one in time—Other's application barred—The latter cannot continue suit revived by the former—Civil P. C., O. 22, R. 1.

The right to be brought on the record vests in the one or the other rival claimant from the date of the death of the deceased party. The limitation therefore begins to run against both the rival claimants and each would get barred by time at the expiry of the limitation prescribed by Art. 176. Therefore one rival claimant, who has not applied to be brought on the record within the limitation period, cannot continue a suit revived by his rival's application in time: *A. I. R. 1923 Nag. 101, Dist.* [P 344 C 1]

(b) *Civil P. C., O. 22, R. 1*—"Right to sue"—Meaning of.

The expression "the right to sue" means the right to bring a suit asserting a right to the same relief which the deceased plaintiff asserted at the time of his death: 36 Cal., 799. *Foll.* [P 344 C 2]

B. K. Bose, V. Bose, M. R. Bobde and P. N. Rudra—for Applicant.

A. V. Khare—for Non-applicant 1.

Order.—The suit out of which this petition for revision arises was filed by one Murlidhar against the present non-applicants 2 to 4 for possession of property on the ground that he succeeded to it as the reversioner after the death of a limited owner. Murlidhar died on 25th February 1926 during the pendency of the suit. The present applicant *Mt. Amritibai* claiming to be his sole legal representative in her capacity of a widow applied on 7th April 1926 to be brought on record as such. The Court thereupon made an order dated 26th April 1926, substituting her name as the sole legal representative of the deceased plaintiff and proceeded with the suit at her instance. While the suit was thus going on the present non-applicant 1, *Ratanlal*, moved the Court to bring his name on record as the sole plaintiff urging that he acquired the interest of the deceased Murlidhar by virtue of an oral bequest and was, therefore, entitled to

(1) *A. I. R. 1919 P. C. 44=43 Mad. 244=46 I. A. 285 (P. C.).*

continue the *lis* in his own name. The time for this application for substitution of names or for the setting aside of the abatement of the suit had long expired. Mt. Amritibai naturally opposed the application of Ratanlal, but the learned Additional District Judge held that the order substituting Amritibai as the legal representative of the deceased Murlidhar saved the suit from abatement and no question of the setting aside of any abatement could, therefore, arise. In this view of the case the lower Court held that Ratanlal's right to continue the suit in his own name as against his rival Mt. Amritibai could not be questioned, on the ground that it was barred by limitation. The applicant Mt. Amritibai has come up in revision against the order entertaining the application of Ratanlal.

The question whether Murlidhar made the alleged oral bequest in favour of Ratanlal is still undecided, as, by an order made by this Court, the further enquiry into the matter has been stayed.

It is contended before me on behalf of Amritibai that even though Ratanlal's right to continue the suit may have originated in the alleged oral bequest, he was like the applicant Amritibai himself under an obligation to apply for substitution within 90 days of the date of Murlidhar's death, and that consequently his application dated 4th September 1926, was barred by limitation, and that the Court below erroneously assumed jurisdiction, which did not vest in it by law in the matter of entertaining it. I think that this contention is correct and ought to prevail. As a devolution of interest caused by the death of a party to a pending suit affords an opportunity to the heir-at-law to claim the right to continue the suit for himself, so it might entitle a legatee also to claim the same. In one case right to continue the suit passes to the heir by the law of inheritance, and in the other it passes under the terms of the bequest. The right thus vests in the one or the other rival claimant, with effect from the date of the death of the deceased party. It, therefore, necessarily follows that the limitation must begin to run against both the rival claimants, and each would get barred by time at the expiry of the limitation prescribed by Art. 176, Sch. 1, Limitation Act. The

contention of the non-applicant Ratanlal that he could continue the suit revived, as it was, by Mt. Amritibai without being required to get his name substituted by means of an application made within the time prescribed by Art. 176, cannot legally prevail, for the simple reason that proceedings initiated by Mt. Amritibai, his rival, could never have been intended by her to enure for his benefit. Ratanlal could not say that Amritibai's assertion of the right to sue or to continue the suit in her own name was in essence an assertion by himself or on his behalf. If both of them had a joint right to sue or to continue the suit in their joint names and only one of them had sued or applied for substitution under a bona fide belief that he or she was or could be the sole plaintiff or the sole legal representative, then the matter would have assumed a different aspect as held in *Narayan v. Amrita* (1). But here, as each has claimed the right to continue the suit exclusively to himself or herself, the case is one of a clear antagonism between them, and one cannot be said to represent the other at all in the matter of substitution of names. The inevitable result is that for purpose of computing limitation Ratanlal's application dated 4th September 1926 must be considered on its own footing and quite independently of the proceedings taken by Amritibai in her own interest.

The expression "the right to sue" means the right to bring a suit asserting a right to the same relief which the deceased plaintiff asserted at the time of his death, as was held in *Sarat Chandra v. Mani Mohan* (2). It, therefore, follows that in the eye of the law the position is the same, as it might have been, had Mt. Amritibai instituted the suit in her own name as it were. Ratanlal could not have forced himself into the case as the sole plaintiff by ousting Amritibai and claiming to continue the suit in his own name, as no Court could have jurisdiction to order a plaintiff who has commenced his suit to vacate in favour of an intruder and hand over to him the conduct of that suit. If the plaintiff who instituted the suit or who has been allowed to continue it, is ultimately found to have no right of suit, he will suffer the consequences; but it

(1) A. I. R. 1923 Nag. 101=18 N. L. R. 21.

(2) [1903] 36 Cal. 799=3 I. C. 995.

will not be legal to deprive him of the conduct of that suit and allow a stranger to continue it. In deciding to entertain Ratanlal's application the lower Court has practically wrested the case from the hands of Amritibai against her will and showed its readiness to hand over the benefit of the *lis* to a stranger, who has yet to establish his right of suit based on the alleged oral bequest. In doing so the Court has erroneously assumed a jurisdiction not vested in it by law, and its order is, therefore, liable to be set aside. The name of Ratanlal, if substituted in the meantime, must be deleted.

The revision is allowed and the case is remanded to the Court of first instance for disposing of the suit on its own merits as between Mt. Amritibai as the sole plaintiff and the non-applicants 2 to 4 as the only parties to the suit. Applicant No. 1, Ratanlal, will pay the costs of this Court and of the lower Court so far they were occasioned by his application dated 4th September 1926. I fix pleader's fee at Rs. 50 for each Court.

R.K.

Revision allowed.

A. I. R. 1927 Nagpur 345

FINDLAY, J. C.

Lakhmichand Trilokchand — Plaintiff—Appellant.

v.

Janardhan and another — Defendants—Respondents.

S. A. No. 392 of 1926, Decided on 12th July 1927, from the decree of the Dist. Judge, Nagpur, D/- 6th April 1926, in Civil Appeal No. 254 of 1925.

(a) *Transfer of Property Act*, S. 60—Mortgagor's right.

The mortgagor's right is not extinguished by the passing of a final decree for sale, but only when the sale is actually held: 42 *All.* 517 and 31 *Cal.* 863, *Ref.* [P. 345, C. 1]

(b) *Transfer of Property Act*, S. 74—Final decree for sale in prior mortgage—Subsequent transfer by mortgagor—Such transferee made party to suit for foreclosure by puisne mortgagee—Payment by transferee to puisne mortgagee is not voluntary.

S. mortgaged a field to H in 1900. The field was again mortgaged to V in 1909. H obtained a final decree for sale in May 1914. V was not made a party to the suit by H. S then, after

the final decree but before actual sale, sold the field to L. V brought a suit for foreclosure in 1920 against S and L and got a decree. L paid up the decretal amount. In a suit by L to redeem H's mortgage:

Held: that L being made party to V's suit cannot be described as a volunteer. [P. 346, C. 1]

W. R. Puranik and *M. R. Indurkar*—for Appellant.

M. R. Bobde—for Respondents.

Judgment.—The plaintiff, Lakhmichand Trilokchand, sued the defendants, Janardhan and Wasudeo, for redemption of a mortgage, dated 10th March 1900, executed by one Ragho and his son Shrawan in respect of an absolute occupancy field. The first Court granted the decree as craved for, but, on appeal by the defendants, the District Judge, Nagpur, dismissed the plaintiff's suit.

The following are crucial data with regard to the present case: (a) Mortgage by Ragho and Shrawan in favour of Godi on 10th March 1900; (b) assignment of rights by Godi to one Hemraj on 9th July 1907; (c) the field was again mortgaged to Balaji and Sadasheo on 13th April 1909; (d) Hemraj, as assignee of the prior mortgage, obtained preliminary decree for sale on 31st July 1912 and final decree on 8th May 1914; (e) on 27th May 1914, the surviving mortgagor (Shrawan) sold the field to Lakhmichand, the plaintiff; (f) subsequently, the field was brought to sale in execution of Hemraj's mortgage and was bought by the present defendants. The subsequent mortgagees had not been shown as parties in Hemraj's suit; (g) on 19th January 1920, Sadasheo, the survivor of the subsequent mortgagees, assigned his rights to Vishwanath Patel who brought a suit and obtained a decree for foreclosure against the mortgagor, Shrawan, and his transferee, the present plaintiff. The latter paid up the decretal amount and now claims, as standing in the shoes of the subsequent mortgagees, to redeem the prior mortgage.

The appeal is solely concerned with the question as to whether the plaintiff has any right to redeem. The learned District Judge so far correctly pointed out that the sale by Shrawan, the surviving mortgagor, to Lakhmichand was valid and a possible interest was transferred thereby in view of the fact that the mortgagor's right is not extinguished by the passing of a final decree for sale, but only when the sale was actually

held: cf. *Shah Mehdi Hasan v. Ismail Hasan* (1) and *Bibijan Bibi v. Sachi Bewah* (2). The learned District Judge, however, held that once the sale takes place, the mortgagor's rights were then extinguished and the plaintiff, as his vendee, was in no better position than if he had purchased from the mortgagor after the sale to the defendants had taken place. The plaintiff was, in short, in the opinion of the District Judge, a volunteer and was not entitled to be subrogated to the subsequent mortgagee's right to redeem the prior mortgage. In this view of the case, the learned District Judge reversed the decree of the first Court and dismissed the plaintiff's suit.

I do not think, however, that this complicated case has received sufficient attention or consideration at the hands of the Judge of the lower appellate Court. The subsequent mortgagees were not joined as parties to the first suit on the prior mortgage and the plaintiff's real contention appears to be that, by paying the decretal amount in Vishwanath Patel's suit, he became subrogated to the right of the subsequent mortgagees to redeem the prior mortgage. Everything seems to me to centre round the intention of the parties when the sale-deed of 27th May 1914 was executed. That sale-deed is not on record. In this connexion, moreover, a question of mixed fact and law arises as to whether this sale-deed is or is not to be held one which was executed *lis pendens*. The question of subrogation, in short, which arises in this case and which was more or less definitely pled in paras. 2 and 3 of the plaint, has not received sufficient consideration at the hands of the lower appellate Court. The present plaintiff, assuming that his sale-deed was a valid one and was not vitiated by the doctrine of *lis pendens*, can hardly be described as a volunteer. He was a party in the second mortgage suit and paid up the decretal amount. It seems to me essential, therefore, that the sale-deed of 27th May 1914 should be on the record as it may afford some clue to the intention of the parties to the transaction. It has, indeed, been suggested on behalf of the present respondents that the doctrine of subrogation does not apply in the circumstances

of the present case and that there seems to have been no intention to keep the other mortgage alive. This, like the other questions, involves findings of fact which it is undesirable this Court should at present consider. The case, therefore, must go back to the lower appellate Court for further consideration.

The judgment and decree appealed against are reversed and the case is remanded to the lower appellate Court for re-trial of civil appeal 254 of 1925 on the merits with advertence to the above remarks. There will be no certificate of refund of Court-fees. Costs incurred in this Court will follow the event.

R.K.

Case remanded.

A. I. R. 1927 Nagpur 346

KOTVAL, A. J. C.

Debidin—Plaintiff—Appellant,

v.

Gaya Pershad—Defendant—Respondent.

S. A. No. 327 of 1925, Decided on 30th July 1927, from the decree of the Dist. Judge, Jubulpore, D/- 30th March 1925, in Civil Appeal No. 13 of 1925.

Limitation Act, Art. 57—Neither absence of power to sell the goods by the pawnee nor to recover the debt out of the sale proceeds bars the pawnee from suing for the debt under the contract of loan—*Contract Act, S. 176*.

Neither the fact that the pawnee had no power to sell the goods pledged to him, nor the express stipulation that the recovery of the debt should be made out of the proceeds of sale to be held by the pawnor, takes away or suspends pawnee's right to sue for the debt under the contract of loan. The suit for the same must be brought under Art. 57 and time runs from the date of the loan: 30 Bom. 218 and 24 All. 251, Rel. on. [P 347, C 1]

Hari Singh Gour—for Appellant.

B. K. Bose—for Respondent.

Judgment.—The defendant borrowed certain sums of money from the plaintiff between the 9th and 16th February 1920 and deposited with him a number of bags of Ram Tilli and Tilli as security for the debt. Although the plaintiff alleges that it was the defendant who was to sell the goods, they were sold by the plaintiff on the 20th May 1921 and the 14th August 1921. The present suit was brought on the 3rd August 1923 for the balance due after giving credit for the sale proceeds.

(1) [1920] 42 All. 517=56 I. C. 172=18 A.L.J. 622.

(2) [1904] 31 Cal. 863=8 C. W. N. 684.

The lower appellate Court on the authority of *Yellappa v. Desayappa* (1) and *Saiyid Ali Khan v. Debi Prasad* (2) held the suit to be time barred. *Yellappa v. Desayappa* (1) was a case of a loan of money secured by a pledge and it was held that the suit for recovery of the amount of the loan was a suit for money lent and none the less so because the money lent was secured by a pledge. *Saiyid Ali Khan v. Debi Prasad* (2) was a case of a loan secured by a pledge of jewellery and the creditor sued for the balance due to him after selling the pledged property. It was held that the fact that moveable property was pledged as collateral security did not render the suit a suit of any other description than that to which Art. 57 of the schedule to the Limitation Act applied, and that the original contract of loan was not put an end to or superseded and no right which did not exist before accrued by the sale.

In the present case the plaintiff alleged that he was not authorized to sell the goods, that the defendant was to sell them himself and that when the goods were sold the plaintiff was to recover the sums lent with interest out of the sale proceeds and make over the balance if any to the pawnor. If there was a deficit the defendant was to be responsible for it. It is contended that by these stipulations the plaintiff's right to recover the debt was suspended till the goods were actually sold and his cause of action did not arise till that time and that the lower appellate Court has failed to distinguish the particular facts alleged in this case from those of the rulings which it has applied.

On the allegations of the plaintiff the main difference between the facts of this case and those of the reported cases is that the plaintiff had not the statutory power to sell the goods pledged given to the pawnee by S. 176, Contract Act. Another difference, if at all it may be called one, is that the recovery of the debt out of the sale proceeds which the law authorizes is here expressly stipulated for. Neither of these differentiating circumstances in my judgment takes away or suspends the right of the plaintiff to sue for the debt under the contract of loan. I do not think that the

suit if brought before the pawnor chose to sell the goods would have been liable to be dismissed as premature.

The decision of the lower appellate Court that the suit is time barred is correct. The appeal fails and is dismissed with costs.

N.D.

Appeal dismissed.

A. I. R. 1927 Nagpur 347

FINDLAY, J. C.

Mulla Fida Ali Sultan Ali—Plaintiff—applicant.

v.

Secretary of State—Defendant—Non-Applclicant.

Civil Revision No. 188 of 1927, Decided on 25th July 1927, from the judgment of the Small Cause Court Judge, Nagpur, D/- 19th March 1927, in Civil Suit No. 1262 of 1925.

Railways, Act. S. 72—Risk-note H—Company is not liable for damages as a result of the waggon going sick.

The words "from any cause whatever" cover incidents which happen as a result of the waggon going sick, and, therefore, the railway company is exempted from liability for loss or damages arising therefrom: 2 N. L. R. 125; 14 N. L. R. 122; A. I. R. 1925 Nag. 350, *Relied on*: A. I. R. 1924 All. 8, *Dist.* [P 348 C 1]

M. R. Bobde—for Applicant.

Order.—The facts of this case are not in dispute. A consignment of tiles was being conveyed to Nagpur by the defendant, the Great Indian Peninsula Railway Company. In the course of the journey at Chalisgaon, the waggon containing the tiles became unserviceable and it was found necessary to tranship them into another waggon. This was done, but the precaution of putting grass between each layer of tiles was neglected with the result that, on the plaintiff's case, more than half the tiles arrived at Nagpur in a broken and unserviceable state. The Judge of the Small Cause Court found that the tiles had been carefully packed in the original waggon, that similar precautions were not taken when the consignment was transhipped at Chalisgaon and that a quarter of them were damaged or destroyed largely as the result of this want of precaution.

On these facts the only question I am at the moment concerned with is whether under risk-note form H the defen-

(1) [1906] 30 Bom. 218=7 Bom. L. R. 739.

(2) [1902] 24 All. 251=(1902) A. W. N. 43.

dant company were absolved from liability. Under the form the railway is exempt from responsibility for any loss, destruction, deterioration or damage to the consignment from any cause whatever, except for the loss of a complete consignment or one or more complete packages due either to the wilful neglect of the railway administration or to theft. Here, I am only concerned with the words "from any cause whatsoever." The argument offered on behalf of the applicant has been that these words cannot reasonably be construed as applying to the peculiar circumstances of the present case. When the contract was entered into, the parties had not in contemplation the abnormal contingency of transshipment becoming necessary, and it is suggested, therefore, that the words "from any cause whatsoever" cannot be held in the present case to cover damages done to part of the consignment owing to negligence on the part of the railway company. I have been referred in this connexion to the decision in *E. I. Ry. Co. v. Gopi Krishna Kashi Prasad* (1), wherein it was held that in the case of a consignment sent under risk-note form B the railway company were not protected in respect of undue delay in delivering the goods.

For my own part, I cannot see any ground whatsoever for differentiating this case in this connexion from the decisions in *Hiralal v. B. N. Ry. Co.* (2), the *Agent, G. I. P. Railway, Bombay v. Karaylal* (3) and the *B. N. Ry. Co. v. Dilloo* (4). The plaintiff deliberately entered into a contract to have his goods conveyed at a cheaper rate and in return therefor he exempted the railway company from liability for loss or damages except in certain specified cases. The argument that the words "from any cause whatsoever" would not cover incidents which happened as a result of the waggon going sick, seems to me to be of no weight whatever. The breaking down of a truck or waggon en route through overheating of axles or any other cause is a most common and ordinary contingency and one that indeed, at any rate, in the case of heating of axles is almost inevitable at times in

this country. It would rather be indeed, in my opinion, that the words "from any cause whatsoever" have precisely reference to contingencies of the kind which arose in this case, and the argument that these words are not wide enough to protect the railway company in the present instance seems to me to have no sound basis. The decision of Daniels, J., in *E. I. Ry. v. Gopi Krishna, Kashi Prasad* (1) seems to me to be distinguishable. In that case, the findings were that the cause of action was not due to any of the special events against which the railway is protected by the risk-note; precisely the converse is true of the present case. The damage caused arose out of an incidence purely incidental to the carriage of the goods from the one station to another.

For these reasons, therefore, I am of opinion that the plaintiff's suit cannot succeed and has properly been dismissed by the Judge of the Small Cause Court. The application is accordingly dismissed without notice to the non-applicant.

N.D.

Application dismissed.

A. I. R. 1927 Nagpur 348

FINDLAY, J. C.

Mahdeo Patel—Plaintiff—Appellant.

v.

Narayan and others — Defendants—Respondents.

S. A. No. 398 of 1926, Decided on 18th July 1927, from the decree of the Dist. Judge, Nagpur, D/- 22nd April 1926, in Civil Appeal No. 3 of 1926.

Acquiescence—Trespasser building on site of another in spite of owner's protesting—Owner suing for possession after two years—He has not acquiesced and is entitled to possession—Evidence Act, S. 115.

The mere fact that more than two years were allowed by the owner of the site to lapse after the building had been begun by a trespasser on the former's site before a suit for possession of the site was instituted does not establish acquiescence, especially when a protest has originally been made by him before the building was begun. The owner is entitled to possession and not only damages: 3 N. L. R. 114, Dist.

[P. 349, C. 2]

D. T. Mangalmoorti and W. R. Puranik—for Appellant.

M. R. Bobde—for Respondents.

(1) A. I. R. 1924 All. 8=45 All. 534.

(2) [1906] 2 N. L. R. 125.

(3) [1918] 14 N. L. R. 122=48 I. C. 294.

(4) A. I. R. 1925 Nag. 350=21 N. L. R. 73.

Judgment.—The plaintiff-appellant's suit for possession of three plots, A, B and C, shown in the map filed with the plaint, was decreed in the first Court so far as plot A was concerned. The four defendants appealed to the Court of the District Judge, Nagpur, while the plaintiff filed a cross-objection to the effect that he was also entitled to a decree with regard to plots B and C. The cross-objection failed, but the defendants' appeal succeeded to the extent that, instead of granting the so-called injunction for the removal of the superstructure and possession of plot A, the lower appellate Court gave the plaintiff a decree for Rs. 60 as damages in respect of the trespass on his land.

Against the judgment and decree of the lower appellate Court, the plaintiff has come up on appeal, while the defendants-respondents have filed a cross-objection. It will be convenient to dispose of the latter first, because, if the cross-objection were to succeed, the plaintiff's suit would be liable to dismissal and no question would arise as to the form of relief the plaintiff was entitled to on the findings of the lower appellate Court.

As regards the cross-objection: the only point pressed therein was that the lower appellate Court erred in not applying the maxim *falsa demonstratio non nocet* as laid down in *Bhayalal v. Dwarka Parshad* (1). I do not, however, think that, in the circumstances of the present case, there is any room for application of the maxim in question. It is true that the sale-deed shows the boundaries of the house to the east and west, but the description is obviously a loose one if only for the reason that a *gali* which, the defendants do not claim, intervenes between Yado Patel's house and the land of the defendants. The position thus arrived at by both the lower Courts was that, virtually the description, whether by measurement or by boundaries, was correct, and this being so I am of opinion that there is no room for interference with the finding of fact arrived at by both the lower Courts to the effect that the strip of land A, measuring $6\frac{1}{2} \times 46$ feet has been encroached on as alleged.

Passing now to the appeal filed by the plaintiff: what has been urged on his behalf is that the lower appellate Court erred in granting a decree for damages

only. In so doing the learned District Judge seems to have been misled by the decision in *Behari Lal v. Sheo Lal* (2). That decision had reference to a question of easement. Here, both the Courts below have come to a finding that there was a deliberate trespass on plot A, and it is further clear that a protest was made at an early stage in this connexion on behalf of the co-sharer whether Mahadeo or Punjabrao is really immaterial for the present purpose. It is true that the protest also had reference to plots B and C which have been held to belong to the defendants, but that, in my opinion, makes no difference as regards the validity of the protest made so far as plot A is concerned.

I cannot see that there has been any proof of acquiescence on the part of the malguzar. The mere fact that more than two years were allowed to lapse after the building had been begun before a suit was instituted does not, in my opinion, establish acquiescence, especially, in view of the fact that a protest had originally been made. The defendants, in proceeding with the building as they did, acted with their eyes open and, both in law and equity, should be obliged to take the consequences. The nature of the relief granted by the lower appellate Court undoubtedly leads to an anomaly. We have here a trespasser who deliberately builds on land he has been warned not to build on; the party aggrieved comes to Court reclaiming the possession of the land so trespassed on; and all the lower appellate Court has done is to grant him damages, more or less arbitrarily settled, instead of the relief of possession he is *prima facie* entitled to.

I am, therefore, of opinion that the judgment and decree of the lower appellate Court are incorrect and that, in substance, the relief granted in the first Court is the proper one. The judgment and decree appealed against are, therefore, reversed and the decree of the first Court is restored with the modification that two months, from the date of the decree of this Court, will be allowed for the removal of the superstructure by the defendants. If they fail to do so within that period, the plaintiff-appellant will be entitled to enter upon the land and to remove or otherwise dispose of the structure as he sees fit. The defendants-res-

(1) [1902] 15 C. P. L. R. 163.

(2) [1907] 3 N. L. R. 114.

pondents must bear the plaintiff-appellant's costs both in the appeal and in the cross-objection.

R.K.

*Decree reversed :
Cross-objection dismissed.*

A. I. R. 1927 Nagpur 350

KINKHEDE, A. J. C.

Jain and others — Defendants 1, 5, 7 and 8—Appellants.

v.

Tukaram and others — Plaintiffs and Defendant 6—Respondents.

S. A. No. 22-B of 1924, Decided on 11th August 1926, from the decree of the 1st Addl. Dist. Judge, Akola, D/- 19th February 1924, in Civ. Appeals Nos. 598 and 600 of 1921.

(a) *Hindu Law—Partition—Limitation.*

When inequality results in unfairness and prejudice to the minor, he can bring a suit for reopening partition and limitation runs from the date of the minor's knowledge. [P 350 C 2]

(b) *Hindu Law—Partition—Reopening.*

When a co-parcener brings a suit for reopening a partition, other co-parceners who do not impeach the partition should not be allowed to get any benefit from the reopening. [P 350 C 2]

A. V. Khare and W. B. Pendharkar—for Appellants.

M. B. Niyogi—for Respondents.

Judgment.—This appeal is against the decision of the lower appellate Court affirming the plaintiff's right to reopen a partition effected in 1907 during his minority so far as it related to the fields on the ground that it is unfair, unequal and prejudicial to the minors' interest. The plaintiff's right to do so is challenged on three grounds: (1) that a suit for partial partition does not lie; (2) that the claim is barred by limitation on the ground that it was filed more than three years after plaintiff attained majority or 12 years after partition; and (3) that the plaintiff's allegations of fraud or mistake are vague and indefinite and that the lower appellate Court has not given a distinct finding as to whether the inequality or unfairness was due to fraud or mistake as alleged.

I think none of these contentions can be entertained in second appeal. The lower Courts have given good reasons for upholding the plaintiff's right to a partial reopening of the partition so far as the fields are concerned. It is not the defendants' case that the apparent inequality of shares of fields which is the best proof of unfairness and pre-

judice to the minors' interest was compensated by allotting a large share of house property to the plaintiff and his brother Yeshwant's share. I cannot, therefore, entertain the first ground. As regards the question of limitation: suffice it to say that the right of a minor co-parcener to reopen partition accrues on knowledge of facts entitling him to reopen, and limitation must, therefore, run against him from the date of such knowledge. Here the finding is that the plaintiff got knowledge only in 1919 and as he filed the suit in 1920 he is well within time. As regards the third and the last objection: I think the defendant should have, by serving interrogatories on plaintiff, called upon him to make more specific allegations of fraud or mistake if he was not satisfied with the version already given in the plaint. It is too late for him to urge that plea now. The lower appellate Court has not given a distinct finding as to whether the inequality was due to fraud or to mistake. I think this may not be necessary as it was sufficient if the inequality was due to either of the two and has resulted in unfairness and prejudice to the minor. The defendants' appeals, therefore, fail, so far as the plaintiff's right to reopen the partition once made is concerned.

The defendants further contend that although the plaintiff may have the right, defendant 6 had no right, and the benefit of the reopening of the partition cannot, therefore, be extended to him. As a fact, defendant Yeshwant has not asked that the partition be reopened so far as his allotment is concerned. It was in virtue of his personal privilege that plaintiff was held entitled to reopen the previous partition. Such is not the case with Yeshwant who has never challenged its binding character as against him. I, therefore, see no reason to allow him to derive an indirect benefit from the reopening of the partition at plaintiff's instance. Although the lower Courts may be entitled to say that Yeshwant's share in the property was one-fourth that is only with a view to ascertain plaintiff's share, but the ascertainment need not go further than this in the absence of any claim by Yeshwant for a re-distribution of the property even as regards his own share. I, therefore, while affirming the decree of the lower

appellate Court, order that the direction to allot 4-annas share to Yeshwant on partition, which is liable to be misunderstood, be deleted, and that only the plaintiff's one-fourth share of the fields in dispute be ascertained and separated from the rest of the property and put in his separate possession. This decree will govern the other appeal consolidated with it.

The appeals virtually fail on their merits and are dismissed with costs; the decrees of the lower appellate Court will be confirmed with the variation set forth above.

N.D.

Appeals dismissed.

A. I. R. 1927 Nagpur 351

FINDLAY, J. C.

Nago Rao—Defendant—Appellant.

v.

Mt. Alookhi—Plaintiff—Respondent.

S. A. No. 555 of 1925, Decided on 25th July 1927.

(a) *Occupancy holding—Fractional share.*

There can be no tenancy in respect of a fractional share of an occupancy field not defined by metes and bounds; 14 N.L.R. 62, *Foll. : A. I. R. 1925 Nag. 124, Dist.* [P 352, C 1]

(b) *Civil P. C., S. 100 — Question of law depending on findings of fact cannot be allowed for the first time in second appeal.*

A person cannot be allowed to raise in second appeal for the first time a question of law which requires questions of fact to be gone into.

[P 352, C 1]

(c) *Landlord and tenant—Co-tenant of occupancy field dying heirless—Lambardar cannot resist possession by other co-tenant.*

When one co-tenant of an occupancy field dies heirless, the lambardar is not entitled to get the undivided fractional share of the deceased co-tenant and so cannot resist the other co-tenant's right to possession of the same.

[P 352, C 2]

N. R. Alekar—for Appellant.

B. K. Bose—for Respondent.

Judgment.—The plaintiff *Mt. Alookhi* sued the defendant *Nago Rao* for possession of field 80, an occupancy one, in mauza Wadwihara. The defendant is the lambardar of the mahal in which the field falls. The field was originally held by one *Tukya* who died in 1909, and, after his death, it was recorded in the names of his widow and his daughter *Pisi*. Both *Sarji* and *Pisi* died in August 1923. The plaintiff claims the field as the daughter of *Pisi*. It is also alleged by her that *Tukya* had, by a registered gift-deed, dated 31st March 1906, made over an undivided half-share in the field to

Pisi and that the defendant had ratified the gift by accepting rent from *Mt. Pisi* and *Mt. Sarji*. *Mt. Sarji* again was alleged to have inherited a half-interest in the field on *Tukya's* death, and to this *Mt. Pisi* succeeded on the death of *Sarji*. It is admitted by the plaintiff that she was entitled to *Pisi's* half-share only by inheritance, but her case was that she is entitled to exclude the defendant from possession of the other half and that consequently it has lapsed to her.

The defendant denied that *Mt. Pisi* had been validly recorded as a tenant and he also denied the gift of the half-share by *Tukya* to *Pisi* and, in any event, pled that gift was inoperative, having regard to S. 46, Tenancy Act 1898.

On these and other issues framed by the Subordinate Judge, the following findings were given :

(i) That *Tukya* had gifted a half-share in the field to *Pisi* as alleged and that the gift was a valid one, there having been no fraud in connexion with its registration such as would render it inoperative.

(ii) That the defendant had ratified the gift in favour of *Pisi*.

(iii) That the plaintiff is the real daughter of *Pisi* and that, in any event, even if she were a step daughter, she could inherit that half which she got by gift, but not the other half.

(iv) That the plaintiff had failed to prove that *Tukya* had left any other heir, but that even so, the plaintiff could claim possession of the entire area in suit.

(v) That the tenancy being indivisible, it could not lapse to the defendant and he was not even entitled to possession of half the tenancy land in question.

The defendant *Nago Rao* appealed to the Court of the District Judge, Nagpur. The learned District Judge found that the gift of a half-share was valid, that the plaintiff was *Pisi's* real daughter, and that, therefore, she was entitled to hold half interest in the tenancy. Following *Sumera v. Premchand* (1), he held that there could be no tenancy in respect of a fractional share of a field not defined by metes and bounds and that, therefore, the defendant could not succeed in his claim, even to hold half the field, until it was established by him that there were no heirs of *Tukya* entitled to hold that half-share.

On behalf of the defendant in this Court it has been urged that it was not for him to show that there were any heirs of *Tukya* surviving, and the appellant's case in this Court has been that

(1) [1918] 14 N. L. R. 62=44 I. C. 845.

there should be a declaratory decree to the effect that he is entitled to retain one-half of the tenancy and that thereafter proceedings under S. 93, C. P. Tenancy Act could be undertaken for the partition of the holding.

I do not think that the appellant's present position is much advanced by the decision in *Sher Singh v. Kalus Singh* (2). The facts therein were wholly different and distinct from those of the present case. There, one of the occupancy tenants had relinquished or abandoned his share in an occupancy holding in favour of the landlord, and the landlord, accepting this relinquishment, recognized his heirs as tenants in his place. Here, the position is entirely different. An undefined half of the present tenancy has, so to speak, disappeared, and the tenancy must for the present be regarded as an undividable one: cf. *Sarjuprasad v. Muratlal* (3). The decision of Batten, A. J. C., in *Sumera v. Premchand* (1) is clear authority for the proposition that there can be no tenancy in respect of a fractional share of a field not defined by metes and bounds. If the position adopted by the appellant could be sustained, a most anomalous state of matters would arise. The landlord would have his own tenancy in respect of the undivided share of the share along with the present plaintiff. From this point of view, therefore, I am of opinion that the decision of the learned District Judge contained in para. 8 of his judgment is correct and this necessarily implies the failure of the present appeal.

It has, indeed, been urged on behalf of the respondent that she is entitled, in any event, to come in as an heir in respect of the remaining half of the field as a daughter's daughter and that she could, therefore, succeed as a bandhu: cf. *Ghunaji v. Tulsi* (4) and *Bansidhar v. Ganeshi* (5). I do not, however, find it necessary to discuss this question, but I feel bound to say that I do not think this contention could, in any event, have succeeded, offered as it has been for the first time in second appeal. Before the point could be adjudicated on, questions of fact would have arisen

as to which school of Hindu law the plaintiff was governed by, and it was perfectly clear from the statement of her pleader recorded on the 16th August 1924, that she only in reality laid claim in her own right to the one-half of the tenancy. As I have indicated, however, it is unnecessary, in the circumstances of the case, to consider this point and, for the reasons already given, I do not think the defendant is entitled even to a declaratory decree with regard to the alleged right to a half-interest in the tenancy.

The appeal accordingly fails and is dismissed. The appellant must bear the respondent's costs. Costs in the lower Courts as already ordered.

R.K.

Appeal dismissed.

A. I. R. 1927 Nagpur 352

HALLIFAX, A. J. C.

Dharmu and others—Defendants—Appellants.

v.

Dalsingh—Plaintiff—Respondent.

S. A. No. 204 of 1927, Decided on 24th August 1927.

Limitation Act, S. 28—C. P. Tenancy Act (1920), S. 104 (4).

Section 28, Limitation Act, applies to the right in a tenancy in the Central Provinces: *A. I. R. 1926 Nag. 99, Diss. from.* [P 352 C 2]

J. Sen—for Appellants.

Judgment.—Mr. J. Sen has been heard for the appellants. Their contention is that S. 28, Limitation Act, does not apply to the right in a tenancy, although S. 104 (4), Tenancy Act, 1920, says in so many words that it does. That is at first sight preposterous, but in support of it I have been referred to the reasons stated by one of the Judges of this Court in *Banan v. Ranjitsingh* (1). The basis of the whole of the reasoning which is given at considerable length appears to be in the statement that the legislature have deliberately abstained from extending the provisions of S. 28, Limitation Act, to the tenancy lands in the Central Provinces.

The statement seems to have been made without reference to S. 104 (4), Tenancy Act, 1920, of which there appears to be no mention in the judgment. The appeal is dismissed without notice to the respondent.

D.D.

Appeal dismissed.

(1) *A. I. R. 1926 Nag. 99.*

(2) *A. I. R. 1925 Nag. 124=22 N. L. R. 17.*

(3) [1901] 14 C. P. L. R. 33.

(4) *A. I. R. 1924 Nag. 98=20 N. L. R. 182.*

(5) [1900] 22 All. 338=(1900) *A. W. N.* 107.

A. I. R. 1927 Nagpur 353

HALLIFAX, A. J. C.

Rao Saheb and another—Plaintiffs—Appellants.

v.

Umrao—Defendant—Respondent.

Second Appeal Nos. 66 and 94 of 1926, Decided on 23rd December 1926, from decree of the Addl. Dist. Judge, Raipur, D/- 9th November 1925, in Civil Appeal No. 141 of 1925.

(a) *Registration Act, S. 17—Lease in perpetuity of sir land for premium over Rs. 100 must be registered—If unregistered the tenancy is from year to year and landlord desiring to eject must return the premium amount—Contract Act, S. 65.*

Where a document agreed to lease sir land in perpetuity for a premium of Rs. 647 on an annual rent of Rs. 12.

Held: it requires registration: A. I. R. 1923 Nag. 171, *Foll.* [P 353 C 1]

In absence of a registered lease, the lessee has to be treated as a tenant from year to year, and if the landlord desires to eject him, he must return the premium amount back according to S. 65, Contract Act. [P 353 C 2]

(b) *Registration Act, S. 17 (2) (v)—Necessity of registration.*

An agreement to lease contemplating that another document would be executed later on does not require registration: A. I. R. 1922 Nag. 98, *Ref.* [P 353 C 1]

(c) *Part Performance—Person in possession can retain it if he can successfully sue the other for specific performance.*

A person in possession of the property of another is entitled to retain that possession if he can show that he could successfully maintain a suit against that person for specific performance of a contract that would give him that title. [P 354 C 1]

(d) *Limitation Act, Art. 113—Document contemplating another document to be executed—No date fixed—Time runs from notice of refusal.*

Where an agreement stated that another lease would be executed, but in the contract no date was fixed for the execution of the second deed.

Held: the three-years period of limitation for specific performance began to run against the plaintiff when he first had notice that the defendant refused to execute it. [P 354 C 1]

M. R. Bobde—for Appellants.

B. K. Bose, V. Bose and D. Y. Deshmukh—for Respondent.

Judgment.—The land in dispute is sir land belonging to the plaintiffs. On the 29th January 1922 they executed a document agreeing to lease it in perpetuity to the defendant for a premium of Rs. 647 on an annual rent of Rs. 12 and they put him in possession. This document undoubtedly required registration, according to the principles stated in *Sonu v.*

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Bhadria (1), and as it was never registered it cannot now be used to prove the lease or the agreement to lease, of which also all other evidence is excluded by S. 92, Evidence Act, so that the defendant has to be treated as a tenant from year to year.

The fact that there was no registered document conferring the lease was not discovered till 1923, and in a suit filed on the 7th September of that year the plaintiffs claimed a decree for ejectment on the false allegation that the lease was for eight years and the defendant was holding over. The suit was dismissed on the ground that the defendant had not been given any notice to quit. Thereafter the plaintiffs gave him formal notice and filed the present suit for ejectment on the 20th April 1925.

In the lower appellate Court it has been found that the plaintiffs are entitled to resume possession of the land, as the defendant must be treated as a tenant from year to year and he has now had ample notice to quit, but that the plaintiffs must pay him back the Rs. 647 he admittedly paid them for the perpetual lease they agreed to give him but never did fully give him. Both parties have appealed against this decree, and the defendant's appeal (S. A. No. 94 of 1926) will be considered in this judgment.

On the facts that have so far been taken into consideration in the case the decision of the lower appellate Court is undoubtedly correct. In deciding that the plaintiffs must pay Rs. 647 to the defendant before taking possession, the learned Addl. District Judge has gone entirely on general principles of equity. That is not necessary when there is a statute governing the matter, and the statute in this case is the Contract Act, of which S. 65 leads to the same result, both in regard to the liability to refund and the amount to be refunded.

But a fact prominently on the record has so far been left out of sight, which makes the primary decision in the case, that of the plaintiffs' right to resume possession, wrong. That is, the fact that the unregistered document contains a very distinct agreement to execute another document later. The words, which are near the beginning of the document, are these:

(1) A. I. R. 1923 Nag. 171=19 N. L. R. 196.

Nambar tafsil zel ko kasht ke liye dekar yah patta damami likh dete hain wo yah karar karte hain ke zamin mazkur-i-bala ki ijazat Sarkar se mangakar wo us men maurusi hakk dekar sani patta damami tahrir kar devenge.

It was a mistake to suppose in the year 1911 that a perpetual lease of *sir* land required the permission of a revenue officer, but the parties were undoubtedly under that mistake, and the intention to execute another document later is probably the reason of the failure to register this one. Anyhow there is the agreement to execute a perpetual lease later, and a document containing such an agreement does not require registration. That such a document contains also covenants which cannot be proved without the document having been duly registered does not prevent it being used for proof of this agreement; an unregistered mortgage-bond can be, and not infrequently is, used in proof of the personal covenant to pay. The matter is discussed shortly in *Jiwandas v. Mt. Janki* (2).

Now, whatever may be the true meaning and limitations of the "doctrine of part performance" which has been mentioned in argument here, it is admitted that a person in possession of the property of another is entitled to retain that possession if he can show that he could successfully maintain a suit against that person for specific performance of a contract that would give him that title; it is assumed that the suit has been filed and decreed and the contract has been executed, because these things are bound to happen.

Now a suit filed by the defendant on 30th April 1925, the day on which the present suit was filed, for specific performance of the contract set out above, would undoubtedly succeed except possibly on the question of limitation. That then is the only question remaining for discussion. In the contract no date was fixed for the execution of the second deed and, therefore, under Art. 113, Sch. I, Lim. Act, the three-years period of limitation began to run against the defendant when he first had notice that the plaintiffs refused to execute it. It cannot be suggested that he had such notice before he was informed of the previous suit for his ejectment, which was filed on the 7th September 1923. His suit for specific performance was therefore well within

time when the present suit was filed on 30th April 1925.

The plaintiffs' appeal will accordingly be dismissed, and in the defendant's appeal it will be ordered that the decree of the lower appellate Court be set aside and the suit dismissed. The plaintiffs will be ordered to pay the whole of the costs of both parties in all three Courts. In this Court the pleader's fee in each appeal will be fifty rupees.

D.D.

Appeal dismissed.

A. I. R. 1927 Nagpur 354

KINKHEDE, A. J. C.

Dashrath—Plaintiff—Appellant.

v.

Tarachand—Defendant—Respondent.

Second Appeal No. 73 of 1927, Decided on 15th August 1927, from decree of Dist. J., Nimar, D/- 21st December 1926, in Civil Appeal No. 93 of 1926.

Hindu Law—Widow—Gift by widow.

A donee from a widow acquires no title under it, unless the gift is one occasioned by spiritual necessity or made in the performance of indispensable acts of duty or religious necessity and relates to property which forms only a small portion of the entire estate. In absence of any such purpose, the gift is void and cannot be validated by subsequent acts of ratification: 8 M. I. A. 529, *Foll.* [P 357 C 2, P 358 C 1]

S. B. Gokhale—for Appellant.

W. R. Puranik—for Respondent.

Judgment.—This is an appeal by the plaintiff-appellant who lost his suit in both the Courts below. His title to sue is based upon a sale-deed, dated 17th August 1924, executed in his favour by Mansaram Bholu and Behari, of whom Mansaram claimed to be a donee of the house in dispute under a deed of gift, dated 25th May 1921, executed in his favour by Mts. Ghisibai and Champabai respectively, the widow and mother of one Nagu Teli, the admitted last male holder. The defendant-respondent is a transferee from one Dr. Hasan Ali, under a deed, dated 22nd July 1924, who in his turn was a purchaser of the same house from Mt. Ghisibai as per sale-deed dated 28th September 1921. The sole question, as rightly put by the District Judge, is whether the alleged gift is valid or void, because, if the alleged gift of 25th May 1921 be good the sale, dated 28th September 1921 can convey no title whereas if the

gift in May is void, the sale in September is valid.

The first Court found that Mt. Ghisibai was incompetent to make a gift of her deceased husband's property and therefore the same was void. It also held that the gift was voidable at Mt. Ghisibai's instance on the ground that it was induced by fraud, but that she did not avoid it, and further that it was not followed by delivery of possession. The result of these findings was that the plaintiff's right to sue was negatived and the claim dismissed. The lower appellate Court upheld the findings as to non-delivery of possession and non-avoidance of the gift, but held that the gift could not be invalid for non-delivery of possession, although it could be treated as valid for want of avoidance by Mt. Ghisibai and that, unless it was found that the donor was incompetent to make the gift, the plaintiff's claim ought to succeed. On this question of Mt. Ghisibai's incompetence to make a gift of her husband's property coming to her by inheritance, the learned District Judge held that the gift is void and could not be ratified by Chunilal, the next reversioner, by subsequently consenting to it on 16th August 1924. The learned District Judge drew the conclusion that Mt. Ghisibai was therefore free to sell away the house to Hasan Ali in September 1921 as the property remained unaffected by the gift of May 1921 and thus the title of the defendant was upheld and the dismissal of plaintiff's suit maintained.

The plaintiff has therefore come up in second appeal. It is urged on his behalf that the Privy Council decision in *Bijoy Gopal Mukerji v. Krishna Mahishi Debi* (1), which has been rightly interpreted in *Kesho Prasad Singh v. Chandrika Prasad* (2), should have been followed and the plaintiff's claim decreed. On behalf of the respondent reliance is placed on the following cases reported in *Abdulla v. Ram Lal* (3), *Pilu v. Babaji* (4) and *Ram Sumran Prasad v. Govind Das* (5) and the cases cited therein, and it is urged that the gift was altogether void and be-

yond the competence of a Hindu widow to make and could not be validated by the reversioner's subsequent ratification and, therefore, the house continued to be the property of Mt. Ghisibai, in spite of the gift and could be sold away by her for valuable consideration, and plaintiff was therefore not entitled to any declaration of his own title thereto.

A persual of the pleadings shows that Nagu Teli had a lot of other estate and that the same devolved on his death on his widow Mt. Ghisibai as his widow. His mother, Mt. Champabai, had no interest in the property during Mt. Ghisibai's lifetime. The house in suit was thus not the only property comprised in the inheritance but formed a fragment thereof. What proportion it formed of the entire estate there is neither pleading nor proof to show it. Nor is it the case of the plaintiff-appellant that the gifted property forms only a very small portion and that the gift was made in the performance of indispensable acts of duty or religious necessity: cf. *Lakshminarayana v. Dasu* (6). The gift in the present case was challenged as being induced by fraud, but the donor's plea of alleged fraud was not made the subject of a suit by her to set aside the gift or to get the deed declared as null and void and of no effect. According to the District Judge's findings it must therefore stand good on the ground of non-avoidance by suit.

The question therefore reduces itself to a question of a Hindu widow's competence to make a disposition of her husband's estate by way of gift. There is also no suggestion that the occasion of the disposition was reasonable or proper with reference to the spiritual need of the donor's husband, according to the notions prevalent amongst the Hindus. I cannot, in the absence of proof aliunde as to the truth of the recitals as held in *Khub Lal Singh v. Ajodhya Misser* (7), attach any importance to those recitals in the gift deed (which appears to be merely formal) wherein it is alleged that the donee, having performed the obsequies of the deceased Nagu and looked after the donors and their comforts, they were making the gift of their own free will and pleasure * * * in order that the donee

(1) [1907] 34 Cal. 329=34 I. A. 87=11 C. W. N. 424=5 C. L. J. 34 (P. C.).

(2) A. I. R. 1923 Patna 124=2 Pat. 217.

(3) [1912] 34 All. 129=12 I. C. 601=8 A. L. J. 1318.

(4) [1910] 34 Bom. 165=4 I. C. 584=11 Bom. L. R. 1291.

(5) A. I. R. 1926 Patna 582=5 Pat. 646.

(6) [1888] 11 Mad. 288.

(7) [1916] 43 Cal. 574=31 I. C. 433=22 C. L. J. 345.

may become owner of the property like themselves with effect from the date of the gift (*bijaya aj tareekhse tum kamil malik bajaya hamare ho chuke*). The words "*kamil malik bajaya hamare*" are very significant. They clearly indicate that the donors purported to clothe the donee with only such title or proprietary rights as they themselves had in the house. It is quite plain that Mt. Champabai had no proprietary or other interest of her own to transfer, and the only interest which Mt. Ghisibai had was that of a Hindu widow in her husband's estate.

In the *Collector of Masulipatam v. C. Venkata Narainapah* (8) their Lordships of the Privy Council have said that for religious or charitable purposes or those which are supposed to conduce to the spiritual welfare of her husband, she (the widow) has a larger power of disposition than that which she possesses for purely worldly purposes.

In the absence of any attempt on the part of the Privy Council to define "the spiritual purpose," the Indian Courts have attempted to suggest certain restrictions of limitations to the meaning to be attached to that expression by holding that

the spiritual purpose should be such as is regarded by the Hindu community as reasonable and proper though not absolutely necessary : cf. *V. Tatayya v. G. Rama Krishnama* (9).

No attempt has been made to justify the gift in question on any of these grounds. Religious necessity or spiritual purpose being, therefore, out of the question, the gift cannot be justifiable and it was, therefore, liable to be impeached at the instance of the donor herself, and also by necessary implication, of her transferee for value under a conveyance, dated 28th September 1921, executed by her and the next reversioner Chunnilal (Ex. D-5) on the ground of want of competency to make it.

The Privy Council decision in *Bijoy Gopal Mukerji v. Krishna Mahishi Debi* (1), on which reliance is placed by the appellant, was a case of an *ijara* lease granted by the widow for consideration, and as such, the principle laid down therein as to alienations for value being voidable at the option or election of the next reversioner, does not in my opinion necessarily apply to the case of a gift which requires no consideration. The

Court of first instance has rightly pointed out that the alienees for value have certain equities in their favour, but no such equities arise in favour of donees who are mere volunteers. The case of a gift thus stands on a different footing from that of a mortgage, sale or lease. This distinction is clearly pointed by the Allahabad and the Bombay High Courts in their decisions reported respectively in *Abdulla v. Ramlal* (3) and *Pilu v. Babaji* (4). The reason for this distinction is plain enough and is not far to seek : in the case of gift, there is no room for the theory of legal necessity ; on the face of it, the gift is a voluntary act of the transferrer. Even the consent of the reversioner to a gift does not, and cannot, put it on materially sounder basis, because the very foundation, namely the existence of a justifying cause, such as legal necessity, whose place is supplied by the reversioner's consent in the case of transfer for valuable consideration, is itself wanting in the case of a gift.

As pointed out by this Court in *Mukund v. Laxman* (10), their Lordships of the Privy Council, in *Collector of Masulipatam v. C. Venkata Narainapah* (8), laid down that the restrictions on a Hindu widow's power of alienation are inseparable from her estate and that their existence does not depend on that of heirs capable of taking on her death. Drake-Brockman, J. C., further observed in the said case that this doctrine was applied in *Narasinha v. Venkatadri* (11) where also, the plaintiff, as in this case, relied on the gift. The result, therefore, if one were to state it in the words of the learned, J. C., is that

a widow would certainly not be at liberty to make a gift of immovable property to a mere outsider like the plaintiff in the present case : in *Chooramani Dasi v. Baidyanath* (12), a gift somewhat of that nature, being one to an idol, was held to be ab initio void.

The learned Judicial Commissioner was, no doubt, dealing with the case of a plaintiff who sued to eject the defendant on the basis of a will made by a Hindu widow in his favour in respect of property inherited by her from her father. The first Court had dismissed the suit on the ground that the testator's life-interest as a daughter came to an end by her death, and her will was, therefore,

(8) [1860] 8 M. L. A. 529=2 W. R. 61 (P. C.).

(9) [1910] 34 Mad. 288=20 M. L. J. 798=6 I. C. 240=(1910) M. W. N. 222.

(10) [1910] 6 N. L. R. 46=5 I. C. 752.

(11) [1885] 8 Mad. 290.

(12) [1905] 32 Cal. 473.

inoperative ; but the District Judge held, on the strength of the Privy Council decisions in *Modhusudan Singh v. Rooke* (13) and *Bijoy Gopal v. Krishna* (1), (on the latter of which cases reliance is placed before me) that the will was not void, but voidable at the option of the heirs of the last male holder, and, failing any such heirs at the option of the Government, and in the end decreed the claim. But the appellate Court's decree was set aside in second appeal by this Court on the ground that

a testator could not bequeath property which he or she could not have alienated inter vivos,

and that the suit being an ejectment suit,

the defendant was entitled to rely not only on his own possession, but also on the *jus tertii* of the Crown if there be no heirs.

These observations, at p. 48, appear to me to lay down the principle which applies necessarily to the present case, because here also, the plaintiff, in order to oust him (defendant), relies on a transaction beyond the legal power of its author, incompatible with a devolution prescribed by law

To my mind, this being a title suit, the plaintiff must succeed on the strength of his own title ; and the defendant, being in possession, is entitled to question the plaintiff's right of suit, even if he cannot make out his own title to the property.

On the basis of a gift made by a manager of a joint family of an item of joint family property on which a minor had a share, the donee sued a person in possession. Both the Courts below gave him a decree. The defendant who was a trespasser went up in appeal to the High Court and urged that the gift to the plaintiff was void ab initio. On the other hand, the plaintiff-respondent urged that the defendant himself, having no right to the property as he was a trespasser, could not question the validity of the gift ; and even, supposing that he could do so, the gift would be invalid only with respect to the minor's share and not with respect to the shares of those who executed the deed of gift and who were not minors. Bayley, C. J., and Fulton, J., of the Bombay High Court, held in that case : *Kalu v. Barsu* (14) that

the plaintiff could not recover. The gift not being made from necessity, or for the performance of any pious duty obligatory on the minor or the family, was invalid, and could not be given effect to even with respect to the shares of the donors.

They further held that

In an ejectment suit the defendant, though a trespasser is entitled to require the plaintiff who seeks to eject him to prove that he has a superior title.

The present suit, though styled as a suit for a declaration of title, in view of the special order given by this Court as the result of proceedings under S. 145, Criminal P. C., *Dashrath v. Tarachand* (15) is, virtually, on the same level as an ejectment suit. In both the plaintiff must, in order to succeed, prove his title to be superior to that of the defendant, who, being in possession holds, the stronger ground and may be a person having even no title. Whether therefore the plaintiff be a donee from a widow, or from a manager of a joint Hindu family owning joint ancestral property, he acquires no title under it, unless the gift is, as pointed out above, one occasioned by spiritual necessity or made in the performance of indispensable acts of duty or religious necessity and relates to property which forms only a small portion of the entire estate. That the powers of a Hindu widow over her inheritance could not be higher than those of a manager of a joint family in the matter of making a gift of a portion thereof, is clearly stated in *Ram Sumran Prasad v. Gobind Das* (5) by Jwala Prasad, J., in the following words at page 676 of the report. [*I. L. R.* 5 Pat. (Ed.)] :

She (widow) succeeds as any other male member to the entire estate of her husband (moveable and immovable) and takes possession of it as an absolute owner thereof. Her interest is not in any way limited nor does she hold a life-estate only as sometimes it is supposed to be. Only her power of disposition is a qualified one and is analogous to the power of a male coparcener in a joint Mitakshara family, and the reason of this is in the nature of her relationship with her husband.

The view of this Court, negating the power of a coparcener or manager of a joint family to make a gift even of his own share of the joint family property, has been enunciated in very emphatic terms in *Ratan Patel v. Laloo* (16), *Sobharam Teli v. Mukdu* (17) and *Vinayak*

(13) [1898] 25 Cal. 1=22 I. A. 164=1 C. W. N. 433=7 Sar. 194 (P. C.).

(14) [1895] 19 Bom. 803.

(15) A.I.R. 1925 Nag. 297=21 N.I.R. 191.

(16) [1888] 1 C.P.L.R. 110.

(17) [1899] 12 C.P.L.R. 63.

Rao v. Laxman (18). If it needs any more emphasis, I have only to state it in the words of Drake-Brockman, J. C., as used in the last-mentioned case that the estate is wholly unaffected by it (gift) and in its entirety stands free of it.

In this state of the law, it could not be contended for a single moment, on the authority of *Maharaja Keshav Prashad Singh v. Chandrika Prasad* (2), relied on by the appellant's learned pleader before me, that a gift by a Hindu widow of the whole of the property of her deceased husband of which she is in possession, is valid against everyone except the reversioners. On the contrary, this Court has gone the length of holding that not only the reversioner but his transferee also can take up the defence open to him : cf. *Sheikh Muhammad v. Ramchandra* (19). Much more would a person who is in the advantageous position of a defendant (nevermind he may have no title of his own) be entitled to put the donee, who comes into Court to assert his title based solely on a gift made to him by a Hindu widow, to strict proof of his right to sue, on the ground that his donor had no legal competence to make it.

But if we were to look to Ex. D-5, referred to above, the position of the defendant is much better than that of a trespasser. His transferrer had taken a conveyance of the house not merely from the widow Ghisibai, but also from Chunnilal, the next reversioner. So, by the conjoint act of the widow and the next reversionary heir, the defendant has succeeded in acquiring a title for valuable consideration, which must necessarily be superior to that of the plaintiff as a mere donee from a Hindu widow. No doubt, after the date of the said conveyance as per Ex. D-5, the plaintiff had attempted to secure, and in fact secured, the ratification of the gift by or on the part of the next reversioner Chunnilal, and obtained from the latter a registered deed dated 16th August 1924 ; but that deed is of no legal consequence, for the simple reason that the gift, being void and and beyond the legal competence of the donor, could not be validated by subsequent acts of ratification. As pointed out in *Mukund v. Laxman* (10), the gift was like the will void ab initio and of no effect, as there can be no ratification of a void act. The

mere execution of the deed dated 16th August 1924 could not clothes the plaintiff with any higher rights than the gift itself could.

Under these circumstances, I uphold the decision of the Courts below and dismiss the appeal with costs. The costs in the Courts below will be paid as already ordered.

N.K.

Appeal dismissed.

A. I. R. 1927 Nagpur 358

HALLIFAX, A. J. C.

Shivdayal—Plaintiff—Appellant.

v.

Rameshwar and others—Defendants—Respondents.

Second Appeal No. 581 of 1925, Decided on 8th November 1926, from decree of Addl. Dist. Judge, Bilaspur, D/- 30th September 1925, in Civil Appeal No. 3 of 1925.

Will—Construction—"Malik" and "malik" kamil.

Where the testator left his self-acquired property to his wife and daughter in full ownership (by using the expressions "malik" and "malik kamil")

Held : the title acquired by the legatees was that of full owner. [P 359 C 1]

M. R. Bobde and G. R. Deo—for Appellant.

V. Bose—for Respondents.

Judgment.—The plaintiff-appellant has been given the decree for which he prayed, which is an unconditional decree for possession of the house he bought from Janki Bai, a Brahmin widow ; but he has been driven to appeal against certain incidental and really irrelevant findings given in the Courts below. The finding as to the nature of Janki Bai's ownership of the property is no part of the basis of the decree and in the future litigation that is sure to arise, if things are left as they are, it would certainly not be binding on the parties to this suit, though there would be much discussion and waste of time in that litigation over the question whether it is binding or not. The parties have, however, agreed that the question of the nature of Janki Bai's ownership of the house under her father's will shall be decided now, and that the decision shall be final and binding on them both.

The inverted method of approaching question of this kind, which is perhaps

(18) [1918] 14 N.L.R. 56=44 I.C. 51.

(19) A.I.R. 1926 Nag. 179.

more common than any other in our Courts, has been followed in the lower appellate Court in this case. There is, first of all, a discussion of all the questions of law that may possibly arise in the case, when the facts come to be looked at, with a statement of all the principles to be found in published judgments of other Courts on which these questions are to be decided. After that comes an application of these principles to the facts which are only incidentally mentioned in the course of the discussion.

The facts bearing on the question to be decided are these : Ramprasad Brahmin, into whose intention, as expressed in his will, we have to enquire, came originally from the Rewa State and had no relatives at Bilaspur except his wife and daughter. On the 3rd July 1911, he executed a will to this effect :

I am old and likely to die, and therefore bequeath all my property, which is self-acquired and consists of three houses and certain moveables described below, to my wife Ganga and my daughter Janki, wife of Bishesar Prasad (who on my death will in any case be my heirs and the owners of the property), and direct that after my death they shall have possession of the property and shall be the full owners of it. My relatives, who have been separate from me for a long time and live in their own country, have no right whatever in my property and no claim to it.

The word translated "owner" is "malik." and "full owner" represents "malik kamil."

If that will is not an expression of a desire and an intention to confer on the two women a full and unqualified estate in the property, in place of the limited estate which they would have inherited in succession without any will, then it is impossible to write a will conveying such an intention. What the finding of the Courts below amounts to is that, though Ramprasad said in his will that he intended to confer an absolute estate on his wife and daughter, he did not really intend to do so because most Hindus are reluctant to do so.

The learned Additional District Judge has added, as a reason, the entirely unjustifiable assumption that Ramprasad's daughter was unchaste during his life to his knowledge. A wanton assertion to this effect was made by defendant 1, which was not only entirely unsupported and found unproved in the first Court, but was disproved by the facts stated by defendant 1 himself.

Janki's husband, defendant 1's brother, died in March 1916, and her father died in October of the same year, and the will was made in July 1911. In the lower appellate Court, however, this scurrilous allegation was accepted as true without any question at all. The learned Judge of the first Court was also of opinion that Ramprasad executed the will merely as evidence that the property he held was his own and acquired by him separately; it was both unnecessary and useless for any such purpose.

It is found that on Ramprasad's death his daughter Janki Bai became the absolute owner of the whole of his property. In this view, or in any view of that question, the form of the order in this appeal must be that it will be dismissed. The two defendants other than Janki Bai will, however, pay the whole of the plaintiff's costs in all three Courts.

D.D.

Order accordingly.

A. I. R. 1927 Nagpur 359

FINDLAY, J. C.

Abdul Majid Khan—Defendant—Appellant.

v.

Tukaram and another — Plaintiffs—Respondents.

Second Appeal No. 570 of 1925. Decided on 8th February 1927, from decree of Addl. Dist. Judge, Nagpur, D/- 21st October 1925, in Civil Appeal No. 49 of 1925.

Evidence Act, Ss. 43 and 8—Previous judgment not inter partes is admissible to prove title when such title is in issue.

Where title of a party is in question, a previous judgment not inter partes, though not res judicata, is a valuable proof of title and is admissible under S. 43 read with S. 8. [P 360 C 1]

Judgment.—The facts of this case are sufficiently clear from the lower Courts' judgments. The plaintiffs-respondents obtained a decree for possession of the site in dispute, together with the removal of the building erected by the defendant-appellant thereon. On appeal by the present appellant to the Court of the Additional District Judge, Nagpur, the decree of the Subordinate Judge, was upheld and the defendant has now come up here on second appeal.

The first contention, which has been pressed on behalf of the defendant-appel-

lant, is that the lower appellate Court has wrongly placed the onus of proof on the present appellant. I have been referred in this connexion to the fact that the Additional District Judge first of all, dealt with the evidence of the defendant in detail and then proceeded to discuss in, the latter part of his judgment, the evidence for the plaintiffs, thus, it is alleged, wrongly placing the burden of proof on the appellant, and it is also suggested that the tenor of paras. 5 to 9 of the appellate judgment suggests the same thing. I am, however, unable to accept this contention. As I read the lower appellate Court's judgment, it does not seem to me that there was any mistake as to where the burden of proof lay, although it may be admitted that the judgment would have been in a better form had the evidence of the plaintiffs been discussed in the first instance. It is perfectly obvious, on the discussion of the evidence by the Additional District Judge, that even fully accepting the position that the initial onus of proof rested on the plaintiffs, they had fully discharged it and that the evidence produced on behalf of the defendant was almost negligible in quality as compared with that for the plaintiffs. I do not think, therefore, that this is a case where any question of misplacing of the burden of proof and of the present appellant having been injured thereby does arise.

The next contention urged on behalf of the appellant is that the judgment and decree in Suit No. 5 of 1917 were inadmissible in evidence. It is perfectly true that the present defendant not having been a party to the said suit the said judgment and decree were not and could not be res judicata. But nevertheless, it seems to me undoubtedly relevant as affording valuable proof of the plaintiffs respondents' title. In the said suit. Mt. Gangabai, respondent 2 claimed from the Government plot 466, which forms part of the land in dispute and she obtained a decree accordingly, the land being cut out of nazul. The judgment and decree in question are, therefore, clearly relevant under S. 43, read with S. 8, Indian Evidence Act. Again, as regards the lease of nazul granted to the plaintiff-respondent 1 (cf. p. 5) of the remaining portion of the plot in dispute, this is also undoubtedly similarly relevant. If the present defendant wanted

to dispute the accuracy of the decision as regards these nazul entries, it would have been open to him to bring a suit for setting aside the nazul entries in question, but this he did not do.

It has next been urged that the lower appellate Court has failed to discuss the question of limitation, which was undoubtedly raised, although in somewhat vague and general terms in paras. 3, 4, and 6 of the defendant's written statement and was again reiterated in ground 6 of the petition of appeal in the Court of the Additional District Judge. This question seems to me quite immaterial now in view of the fact that there is on record a definite finding of fact that Rodba only occupied the site with the plaintiff's permission, and a similar remark applies to Zibal. No question of limitation, therefore, in the defendant-appellant's favour could possibly arise on the perfectly legitimate findings of fact arrived at by the two lower Courts.

It has next been suggested that a decree for removal of the house should not have been granted and that the plaintiff should, in the discretion of the Court, at the best, only have been awarded compensation. It is perfectly clear, however, that the present defendant-appellant proceeded with the building of this house on the most shadowy and immaterial grounds and that the plaintiffs did not acquiesce therein, but on the contrary, endeavoured to prevent its erection.

If ever there was a case for granting the relief which the lower Courts have given the plaintiffs, the present was, in my opinion, one and I can find not the slightest ground for disturbing the judgment and decree of the lower appellate Court. The appeal is accordingly dismissed. The appellant must bear the respondent's costs. Costs in the lower Courts as already ordered.

G.B.

Appeal dismissed.

A. I. R. 1927 Nagpur 360

KINKHEDE, A. J. C.

Kadu Mahar—Defendant 1—Appellant.

v.

Maharaj Singh—Plaintiff—Respondent.

Second Appeal No. 345 of 1926, Decided on 27th July 1927, from decree of Dist. Judge, Bhandara, D/- 11th March 1926, in Civil Appeal No. 69 of 1925.

Waiver—Defendant contracting to sell occupancy field—Failure by defendant to serve notice on the landlord—Express repudiation by him—Plaintiff serving notice on the landlord after two years—Suit for specific performance just before three years—Delay was held not to amount to waiver.

Defendant contracted on 4th March 1922 to sell his occupancy field, the contract to be performed within two months. The defendant failed to perform the same by reason of his failure to serve notice on the landlord of his intention to sell and he expressly repudiated it by serving notice on plaintiff purchaser on 4th September 1922. The plaintiff then served, on 23rd August 1924, a notice on the landlord notifying his intention to purchase the occupancy field, and brought a suit for specified performance on 26th February 1925.

Held: that the delay or inaction was no proof of waiver or abandonment of the right, inasmuch as the plaintiff had notified his intention to enforce the contract not to the defendant but to the landlord. [P 362 C 1]

C. B. Parakh—for Appellant.

M. R. Bobde and *M. R. Indurkar*—for Respondent.

Judgment.—This second appeal raises one question only. It is this. The plaintiff's contract of purchase, which is dated 4th March 1922, and which was to be performed within two months, but which the defendant admittedly failed to perform by reason of his failure to serve notice on the landlord of his intention to sell, and which he expressly repudiated by serving notice on plaintiff on 4th September 1922, was to be regarded as still subsisting at the date of the suit, namely, on 26th February 1925, i. e., after the lapse of two years and five months from the time its repudiation had become known to him (plaintiff). In short whether the silence of plaintiff from 4th September 1922 to 26th February 1925 was indicative of an intention to forgo the right to enforce due performance of the contract or it was consistent with the plaintiff's treating that right as still subsisting. The lower appellate Court, dissenting from the view taken of the facts by the trial Court, came to the conclusion that the delay or inaction was no proof of waiver or abandonment of the right, inasmuch as the plaintiff had notified his intention to enforce the contract not to the defendant, but to the landlord, by serving notice on him on 23rd August 1924. The Court of appeal has regarded this serving of notice on the landlord as a piece of evidence negating the inference of abandonment or waiver which the delay in forcing the contract might lead to.

The correctness of this conclusion is being challenged in second appeal. The question, therefore, is whether the Court of first appeal has drawn the only right conclusion from the facts found or has committed any error of law in failing to draw the right conclusion.

To my mind the silence was very significant and could have given rise to the inference for which the appellants are fighting, especially as, in view of the express repudiation of the contract of sale on the defendant's part, plaintiff's silence was liable to be misconstrued as conduct amounting to waiver or abandonment. Under the circumstances, it was the plaintiff's duty to speak out and put himself into communication with the defendant directly, and disabuse him of the impression by warning him that he was going to be held bound to perform the contract of sale in spite of the breach he committed, and that, with that end in view, he (plaintiff) had taken steps to secure his own position, even as against the landlord, by serving a notice practically on his (defendant's) behalf of his (tenant's) intention to sell the holding to him, and calling upon him to enforce a right of pre-emption. How far this indirect notification of the tenant's intention to sell by the purchaser to the landlord was effective as against the latter, is not a matter the legality of which can or need be tested in this suit; still it was not without value as a piece of conduct on plaintiff's part indicating that he still had the willingness and readiness to perform his part of the contract, namely, to purchase and pay the unpaid purchase money for the land. No doubt the plaintiff could have made it much more effective, even as against the defendant, by sending him a copy of the notice served on the landlord, and thus apprising him also of the steps he was taking towards the enforcement of the contract of sale, but then he failed to so notify them to the defendant. I have, therefore, to consider whether from this omission on plaintiff's part to notify his intention to enforce the contract to the defendant, the latter could be said to have in any way been misled into acting to his prejudice. On the findings arrived at by the lower appellate Court, defendant 1 has not acted to his prejudice. There is, therefore, no reason to think that the omission was in any way instrumental in leading the de-

fendant to infer abandonment or waiver and to act to his prejudice, so as to debar the plaintiff from asserting that his right to enforce the contract was still subsisting.

I fully appreciate that the intention not to forgo would have been very clearly manifested to the defendant had the plaintiff intimated to him that he had served a notice on the landlord; but from his failure to do so, no inference is legitimately deducible that he thereby wanted to suggest that he had given up his intention to enforce performance of the contract of sale as against his vendor. The evidential value of this piece of conduct, of serving notice on the landlord, would certainly have been augmented had the defendant also been made aware of the fact; but the omission to inform him does not take away from the intrinsic evidentiary value which that piece of conduct has as supporting the plaintiff's intention to enforce the contract of sale as a subsisting contract as against the defendant. On the whole, then, I hold that the inferences drawn by the lower appellate Court are legitimate, and justified by the circumstances held proved in the case, and that the decision must therefore stand.

The appeal fails and is dismissed with costs.

R.K.

Appeal dismissed.

A. I. R. 1927 Nagpur 362

FINDLAY, J. C.

Mt. Jani—Plaintiff—Appellant.

v.

Bapu and others — Defendants—Respondents.

Second Appeal No. 575 of 1925, Decided on 28th April 1927, from decree of Dist. Judge, Nagpur, D/- 21st September 1925, in Civil Appeal No. 90 of 1925.

(a) *C. P. Tenancy Act, S. 11—Surrender of occupancy holding by Hindu widow—Reversioners cannot challenge.*

A surrender of occupancy holding by a Hindu widow cannot be challenged by the reversioners of the last male holder on the ground of want of legal necessity: *A. I. R. 1927 Nag. 129; 9 N. L. R. 126; and 5 N. L. R. 172, Foll.: A. I. R. 1925 Nag. 306, Expl.* [P 362 C 1]

(b) *Hindu Law — Alienation by widow — Greater portion of consideration for necessity—Alienation cannot be challenged.*

Where the great part of the consideration for alienation by a Hindu widow is for legal neces-

sity, the validity of the transaction, as a whole, cannot be questioned solely on the ground of absence of legal necessity: *A. I. R. 1924 Nag. 109, Foll.* [P 363 C 1]

W. Y. Deshmukh and S. A. Ghadgay—for Appellant.

V. V. Bose—for Respondent 1.

Judgment.—The plaintiff-appellant *Mt. Jani's* suit for a declaration that the surrender of occupancy field No. 115 of mauza Sakharkheda, made by the widow of *Dasriya*, the last male-holder, is not binding on her, she being the daughter of *Dasriya*, has been dismissed in both the lower Courts.

The facts of the case are sufficiently clear from the two judgments on record. The main argument put forward on second appeal has been founded on certain remarks of *Kinkhede, A. J. C.*, in *Wasudeo v. Bhiwa* (1), and I have been asked, in the course of argument, to refer the general question of the powers of a Hindu widow with regard to a surrender by her of a holding of her late husband and the effect thereof on the reversioners to a Full Bench in view of the remarks of the learned *A. J. C.* in the case quoted above. Meanwhile, however, the question has been fully discussed by *Hallifax, A. J. C.*, in *Bikham v. Thakur Ganesh Singh* (2), and for my own part I find myself in full agreement, not only with that decision, but with the decisions in *Dajiba v. Raghunath* (3) and *Vithal v. Mt. Mendri* (4).

As a matter of fact, there is no necessary conflict between the two earlier cases quoted and the decision of *Baker, J. C.*, and *Kinkhede, A. J. C.*, in *Wasudeo v. Bhiwa* (1). As at present advised, therefore, I can see no reason for once more reopening the question involved, and there was apparently no room in the present case for a plea that the surrender made by *Mt. Beni* was impeachable because of fraud or any other like ground.

It becomes, therefore, unnecessary to go into the question of legal necessity, but my attention has been directed by the counsel for the appellant to the finding of the lower appellate Court contained in para. 6 of its judgment. It has been suggested that anyhow some Rs. 200 out of the total consideration of Rs. 1,000 has not been proved to be for legal necessity. Even if this be accepted as correct, the

(1) *A. I. R. 1925 Nag. 306=21 N. L. R. 62.*

(2) *A. I. R. 1927 Nag. 129=23 N. L. R. 1.*

(3) [1913] 9 N. L. R. 126=20 I. C. 920.

(4) [1909] 5 N. L. R. 172=4 I. C. 792.

principle laid down by Prideaux, A. J. C., in *Bhadaji v. Ganeshrao* (5), would obviously apply. The great part of the consideration was, in any event, for legal necessity and it is difficult to see how, in those circumstances, the validity of the transaction as a whole could be questioned solely on this ground. It has indeed been suggested that the plaintiff should have got a decree conditional on her paying back the amount of the consideration which fell under the head of legal necessity, but, in the present case, only a claim for a declaration was asked for and obviously no such decree, as is now suggested, could, in the circumstances of the case, have been granted.

I find myself in full agreement with the learned District Judge and dismiss the present appeal. The appellant must bear the respondents' costs. Costs in the lower Courts as already ordered.

D.D. *Appeal dismissed.*

(5) A. I. R. 1924 Nag. 103=20 N. L. R. 4.

A. I. R. 1927 Nagpur 363

KINKHEDE, A. J. C.

Balayya—Plaintiff—Appellant.

v.

Nandlal—Defendant—Respondent.

Second Appeal No 395-B of 1924, Decided on 19th November 1926, from the decision of 2nd Addl. Dist. Judge, Akola, D/- 30th August 1924, in Civil Appeal No. 36 of 1924.

Transfer of Property Act, S. 53—Price adequate—Debts real—Preference to one or two creditors is not necessarily fraudulent.

Where debts are found to be real and the consideration is not grossly inadequate, the mere fact that preference was given to one or two creditors is no ground for imputing a fraudulent intention to the vendors and the vendee, so as to bring the transaction within the scope of S. 53: 25 Bom. 202 and A. I. R. 1915 P. C. 115, *Foll.* [P 364 C 2]

D. T. Mangalmurti—for Appellant.

W. B. Pendharkar—for Respondent.

Judgment.—This appeal is by the plaintiff who lost his suit in the Courts below. He sued on foot of a registered sale-deed, dated 30th March 1922, executed in his favour by three brothers, Rajlingu, Piraji and Balu, in respect of the fields in suit for a consideration of Rs. 3,000. The possession of the fields was actually transferred to the purchaser who then sublet them to the vendor Rajlingu for the year 1922-23 under a bataipatra, dated 17th April 1922. It appears he was allowed

to hold over on the same terms after the expiry of the terms of the bati contract. While the plaintiff was in possession defendant Nandlal sued Piraji and obtained a decree, on 31st March 1922, and in due course attached the fields in suit. Plaintiff preferred an objection, but the same was disallowed by holding the sale to be fraudulent; and the attachment was maintained as regards Piraji's one-third share and withdrawn as regards the remaining two-third shares of Rajlingu and Balu. The plaintiff therefore sued to set aside the summary decision passed in Civil Suit No. 194 of 1921 on the file of Munsif, Basim. The defendant alleged that the sale was fraudulent and the lease was bogus and intended to give colour to the transaction of sale. The first Court found the sale proved and held that it was for valuable consideration and not fraudulent. It accordingly decreed the claim. The decree-holder defendant, therefore, appealed to the Additional District Judge's Court.

The learned Additional District Judge notes that the execution of the sale was not disputed before him. So the only ground of attack was the so-called fraudulent nature of the transaction. Of course the plaintiff, being unsuccessful in the claim proceedings, had the burden of proving the reality and good faith of the transaction. The vendee, and one of the vendors Rajlingu, and one of the creditors Mt. Munna, have been put in the witness-box. One more witness, Rajanna, has been examined to prove that Rajlingu was separate from his other brother Piraji. The plaintiff's relationship has been relied on as one of the circumstances tending to prove the fraudulent nature of the transaction of sale.

As regards consideration the lower appellate Court has found that out of the five items forming the consideration, viz.:

- (1) Rs. 50, already received
- (2) „ 275, due to plaintiff by all three brothers on account of old debts
- (3) „ 424, due to one Rodba by all three brothers, undertaken to be paid by plaintiff
- (4) „ 725, due to one Munna on a pro-note executed by Rajlingu and Piraji, undertaken to be paid by plaintiff; and
- (5) „ 1526, due on a mortgage executed by all three brothers in favour of one Ragunath Marwadi undertaken to be paid by plaintiff.

Rs. 3,000

There is no independent evidence to prove the payment of Rs. 50 and the existence of the prior debt of Rs. 275, and the payment of Rs. 424 to Rodba as per Ex. P-4. Thus Rs. 749 disappeared as unproved. As regards the fourth item of Rs. 725 the lower appellate Court held that though the creditor Munna was examined to prove the genuineness of receipt Ex. P-5, there was no satisfactory and convincing evidence to prove the existence of the debt. The lower appellate Court thus held the consideration of the sale to the extent of Rs. 1,474 unproved. This left a balance of Rs. 1,526. With regard to this item the Court of appeal entertained suspicion in view of the repayment of Rs. 531, said to have been made towards the debt by Rajlingu. According to plaintiff the money was supplied by him, but the payment was made by Rajlingu's hand. But in this he was contradicted by the mortgagee who denied all knowledge of the plaintiff's sale. In short the story of the havala was held to be sham. He thus concluded, that excepting the mortgage there was no proof of other debts, and even as to the mortgage there was no proof of havala. As regards the possession of the property he found that there was no satisfactory evidence to prove that possession was in fact transferred to plaintiff.

Taking the relationship of the parties to the sale to the vendee, the proximity of the sale to the date of the decree, and the absence of all attempt at taking possession in consideration, the lower appellate Court concluded that the sale was fraudulent and intended to defeat the defendant creditor. The first Court's decree was upset and the plaintiff's claim dismissed.

The plaintiff, therefore, comes up in second appeal and contends that the lower appellate Court has misapprehended the real question at issue; that the sale-deed itself was the best evidence of the havala and that the sale by three persons could not have been intended to defeat the creditor of one brother and that S. 53, T. P. Act, does not prohibit undue preference to one of several creditors.

I think on each of these points the plaintiff is entitled to succeed. The sale having been held proved the duration to pay the debts to the several creditors implied an admission of the existence of the several debts and of the liability thereof

being subsisting and outstanding, not against one or the other of the executants, but as against all of them jointly. What may have originally been the debt due by one was treated as a debt payable by all three and liable to be satisfied out of the interest of all three brothers without distinction. Then again the balance of the consideration of the sale, apart from the mortgage encumbrance which was then ascertained to be of Rs. 1,526 was Rs. 1,474. This represented the price of redemption of all the three brothers. The proportionate value of Rajlingu's equity of redemption would at the most be Rs. 491. No attempt has been made to prove that Piraji's equity of redemption has been sold for less than its proper value.

There is therefore no ground for suspecting the bona fides of the transaction merely because the sale was effected just a day before the decree was passed or because it was in favour of a relation or because one of the vendors was chosen as the bataidar by the vendee. It is said that there is no convincing proof of the evidence of the other debts. Ex. P-4 evidences a payment of Rs. 424 to Rodba on 4th April 1922, and Ex. P-5 of Rs. 725 to Munna under the same date. Munna has pledged her oath to the truth of the admission made by her in the receipt (Ex. P-5) that she received the payment towards a debt due to her. These two documents have been held proved by the Court of first appeal, but have been suspected not to represent a real state of facts. I see no reasonable grounds for the lower appellate Court's suspicions which, on the face of them, seem to be wholly unwarranted.

The mere circumstance, that the respondent's debtor Piraji preferred the two creditors Rodba and Munna and the plaintiff to whom also Rs. 275 were due as admitted in the sale-deed, is no ground for imputing a fraudulent intention to the vendors and the vendee, so as to bring the transaction within the scope of S. 53, T. P. Act, especially as the price fetched is not alleged or proved to be grossly inadequate. The cases in *Bhagwant v. Kedari* (1) and *Musahar Sahu v. Hakim Lal* (2) fully support this proposition of law.

(1) [1900] 25 Bom. 202=2 Bom. L. R. 986.

(2) A. I. R. 1915 P. C. 115=43 Cal. 521=43 I. A. 104 (P. C.).

I am not prepared to go to the length of imputing an intention to Piraji's other brothers to defeat creditors or to become parties to a plot of Piraji to defeat the present respondent Nandlal and to go to the length of inventing some debts and to admit that they were due to them. On the contrary the sale appears to be genuine and for consideration and intended to take effect.

For all these reasons I differ from the lower appellate Court and hold that the sale has been improperly regarded as fraudulent by that Court. The result is that the decree of the appellate Court is set aside and that of the first Court restored with costs in all Courts to be paid by the defendant-respondent.

D.D.

Appeal allowed.

A. I. R. 1927 Nagpur 365 (1)

HALLIFAX, A. J. C.

Shaikh Gulab—Plaintiff — Applicant.

v.

Layanuji Bari—Defendant—Non-applicant.

Civil Revn. No. 155-B of 1926, Decided on 30th November 1926, from order of Sm. C. C. Judge, Daryapur, D/- 10th August 1926, in Small Cause Suit No. 301 of 1926.

Provincial Small Causes Courts Act, Sch. 1, Art. 41—Suit for contribution of lease money against co-lessee is barred.

A suit by plaintiff for contribution of the money paid by plaintiff on defendant's behalf for taking a joint lease is not cognizable by Small Cause Court.

A. V. Khare—for Applicant.

Order.—The allegations in the plaint are that the plaintiff and the defendant and three other persons took a joint lease of a field for Rs. 1,000, of which the plaintiff paid the whole on the 10th January 1923; he accordingly instituted the present suit against the defendant for the recovery of the one-fifth share of the money he ought to have paid.

The plaint was filed on the 30th of October 1925 in the Court of the Subordinate Judge, and returned to the plaintiff on the 15th February 1926 on the ground that the suit was triable by the Small Cause Court. It was presented to that Court on the 18th February and returned again to the plaintiff on the 10th August, the learned Judge being

of opinion that the suit was excluded from the jurisdiction of that Court by Art. 41 of the Schedule of the Small Cause Courts Act.

No reason is stated by the learned Subordinate Judge for holding that the suit is triable by a Small Cause Court, and it is not improbable that he overlooked Art. 41 of the schedule of the Act. It might possibly be suggested that the word joint in the article refers to the property of a joint Hindu family, and in fact some such suggestion was made in this Court. But that is shown to be incorrect by the separate mention of that sort of property later in the same article.

The order of the Court of the Subordinate Judge, passed on the 15th February 1926, under which the plaint was returned to the plaintiff, is set aside. The plaint, which has been filed here, will be sent to that Court and accepted by it as filed on the 30th October 1925. No order in respect of the costs of these proceedings is required.

G.B.

Order set aside.

A. I. R. 1927 Nagpur 365 (2)

FINDLAY, J. C.

Lalchand—Plaintiff—Appellant.

v.

Bahadur—Defendant—Respondent.

Second Appeal No. 75 of 1926, Decided on 30th November 1926, from decree of Addl. Dist. Judge, Bhandara, D/- 4th November 1925, in Civil Appeal No. 17 of 1925.

Maxim—*Pari delicto potior est conditio possidentis.*

A purchased a house benami in the name of B to defeat his creditors, B being aware of the fraud, and executed a bogus rent note in B's name. B sued A for rent.

Held: that B being a party to the fraud the maxim in *pari delicto potior est conditio possidentis* would apply. [P 366 C 2]

W. Y. Deshmukh—for Appellant.

Fida Hussain—for Respondent.

Judgment.—The plaintiff Lalchand sued the defendant Bahadur in the Court of the Subordinate Judge, 2nd Class, Bhandara, for Rs. 71-5-0, alleged to be due to him on account of rent of a house let to defendant on 6th March 1918. He based his claim on a rent-note (P. 2) of the date named. Defendant's case was that he himself owned the house and that

the rent-note was bogus. Defendant had been surety for a loan taken by one Chotoo from Tikaram of Bhandara, the latter obtained a decree against principal and surety, and defendant's house was taken in execution of the decree, put up in auction and purchased by Nasim Khan, agent of Tikaram. Defendant owed money to Tikaram on a mortgage of the house and was in debt elsewhere as well. Tikaram and Nasim Khan were willing that defendant should re-buy the house on condition he paid up the mortgage debt and the price paid by Nasim Khan at the auction. As plaintiff was then an intimate friend of defendant, the former's name was shown as vendee in order to defeat the claims of other creditors. Defendant all through remained in possession of the house: the rent-note was merely executed as a safeguard against any other creditor attaching the house. Lalchand, plaintiff, had changed his attitude and made a false claim on the rent-note. Other incidental pleas were offered by both parties, which are not sufficiently clear from the judgments of the two lower Courts.

The Subordinate Judge held that the payment of the mortgage amount, the continuous possession of defendant, the repairs made by him, the entries in the municipal record, the non-recovery of rent from defendant, and the recent friction between plaintiff and defendant, all pointed to the sale in plaintiff's favour being a benami and bogus transaction. He accordingly dismissed the suit. Plaintiff appealed and the Additional District Judge, Bhandara, was of opinion that the decision of the Subordinate Judge was correct. The Judge of the lower appellate Court, in this connexion, subjected the evidence to a close and careful scrutiny and came to the conclusion that the sale in plaintiff's favour was a benami one. The appeal was accordingly dismissed.

On second appeal to this Court, it has been urged by plaintiff's counsel that defendant should not have been allowed to plead and take advantage of his own fraud, that the defendant has taken full advantage of his own fraud, e. g., the evidence of Tanba (D W. 2) shows that his master, one of defendant's creditors, accepted Rs. 20 in full satisfaction of a debt of Rs. 146, and that the house would not now be in defendant's possession had

it not been for his fraud. Reliance was placed on *Yaramati Krishnayya v. Chundru Papayya* (1) and *Honapa v. Narsapa* (2). On the other hand, it seems to me that plaintiff was a party equally to the fraud. He must have known full well that the sale was taken in his name only to defeat the claims of defendant's other creditors, and from this point of view the case is one to which the maxim *in pari delicto potior est conditio possidentis* applies with full force. It is in reality plaintiff, who, coming to Court with the claim he does, is attempting to take advantage of the fraud and, from this point of view, the principle laid down in *Raghavalu Chetty v. Adinarayana Chetty* (3) and *Jadu Nath v. Rup Lal Poddar* (4) is clearly applicable to the case. It seems to me that it is immaterial whether plaintiff knew the exact circumstances surrounding the so-called benami sale in favour of Nasim Khan, although the probabilities are in favour of the view that he did. In the present case it was open to the defendant to show the turpitude both of himself against an action by the plaintiff which, if successful, would virtually give effect to a deed entered into for a fraudulent and illegal purpose. On grounds of public policy this rule is constantly enforced by the Courts and the present is clearly a case in point.

It has again been urged, (cf. p. 3,) that it was plaintiff who repaid the Rs. 203 towards Tikaram's mortgage. Even if this were so, as a consequence of some arrangement between plaintiff and defendant, there was ample other evidence on record to justify the concurrent finding of both Courts as to the benami nature of the main transaction and there is no room for interference in this respect by this Court on second appeal.

The appeal is accordingly dismissed. Appellant must bear the respondent's costs. Costs in the lower Courts as already ordered.

G.B.

Appeal dismissed.

(1) [1897] 20 Mad. 326.

(2) [1899] 23 Bom. 406.

(3) [1909] 32 Mad. 323=2 I. C. 616=5 M. L. T. 77.

(4) [1906] 33 Cal. 967=10 C. W. N. 650=4 C. L. J. 22.

A. I. R. 1927 Nagpur 367

MACNAIR, A. J. C.

Govind—Appellant.

v.

Laxman—Respondent.

Second Appeal No. 146-B of 1924, Decided on 23rd December 1926, from decision of the Dist. Judge, Amraoti, D/- 4th March 1924, in Civil Appeal No. 37 of 1923.

Civil P. C., S. 39—Transfer of decree—Application for transferring the same decree to third Court can be made to the Court passing the decree.

Where a decree has been transferred for execution to another Court, an application to transfer the same decree for execution to a third Court, or to execute the decree itself, can be made to the Court passing the decree: 13 C. P. L. R. 169, *Foll.* [P 367 C 1, 2]

G. G. Hatwalne—for Appellant.

M. B. Niyogi—for Respondent.

Judgment.—The only question raised in this appeal is whether the application, dated 15th July 1916, to the Poona Court of Small Causes was made to the proper Court. The Poona Court had previously transferred the decree to the Akola Court for execution, and the question is whether the Poona Court could subsequently entertain an application for transfer of the decree to a third Court. I remark that it appears to me clear that, if a Court has power to send a decree to another Court, it has power to execute the decree itself; for if it has power to take steps towards the attachment of property outside its jurisdiction, it can surely attach property within its jurisdiction. The learned Additional District Judge, relying on *Gorakhram v. Sivaiya* (1), a clear decision of this High Court, has answered the question in the affirmative.

The authorities to the contrary are certainly formidable. In *Maharaja of Bobbili v. Narasaru Peddabali Simhulu Bahadur* (2), it was held that in a case such as this the Court which passed the decree had no jurisdiction to entertain an execution application unless concurrent execution had been ordered or proceedings in the Court to which the decree was sent had been stayed for the purpose of executing the decree in the former Court. In *Rangaswami Shetti v. Sheshappa* (3),

it was held that an application for transfer of a decree again to another Court must be made in the first instance to the Court to which the decree had already been transferred. I add that in *Mitra's Limitation Act*, 7th edition, p. 569, and in *Rustomjee's Limitation Act*, 3rd edition, p. 789, the view opposed to that taken in *Gorakhram v. Sivaiya* (1) is taken to be the law.

The Madras case, however, was taken in appeal to the Privy Council, and their Lordships of the Privy Council appear to me to have refrained from expressing entire agreement with their Lordships of the Madras High Court. They expressly referred to the fact that the application to the transferring Court was for the sale of property within the jurisdiction of the Court to which the decree had been transferred, and mentioned that this very property had been attached by the latter Court. The proposition which their Lordships of the Privy Council affirmed is that when a decree is transferred to another Court, an application to do something which that other Court can adequately perform cannot be made to the transferring Court.

I agree with the respectful observations of the lower appellate Court to the effect that the learned Bombay Judges who decided *Rangaswami v. Sheshappa* (3) appear to have thought that their Lordships' remarks were of more general application than they really are.

In *Saroda Prosad Mullick v. Lutcheemput Singh* (4), their Lordships of the Privy Council have clearly held that a decree could be transmitted to three Courts concurrently for the purpose of execution. It is not urged before me that alterations in the Civil Procedure Code have affected the validity of this judgment. It appears to me that the later judgment reported in *Maharaja of Bobbili v. Narasaru Peddabali Simhulu Bahadur* (5), is quite consistent with the earlier decision. I do not see why, if a Court can send a decree for execution to two Courts simultaneously, it cannot do so on different dates. It is no doubt necessary for a Court, after transfer of a decree for execution, to take precautions in complying with a second

(1) [1900] 13 C. P. L. R. 169.

(2) [1912] 37 Mad. 231=23 M. L. J. 236=15 I. C. 738=(1912) M. W. N. 721.

(3) A. I. R. 1922 Bom. 359=47 Bom. 56.

(4) [1872] 14 M. L. A. 529=17 W. R. 289=10 B. L. R. 214 (P. C.).

(5) A. I. R. 1916 P. C. 16=39 Mad. 640=43 I. A. 238 (P. C.).

request for transfer or execution ; it may be advisable that the Court should always send orders for stay of execution to the transferring Court before taking such further actions. But the Court is aware of the former transfer, and can take proper action on the later application.

I do not, therefore, see reason to disagree with the reported ruling of this High Court in *Gorakhram v. Sivaiya* (1). The appeal, therefore, fails and is dismissed. Costs on the appellant.

R.D.

Appeal dismissed.

A. I. R. 1927 Nagpur 368

FINDLAY, J. C.

Sadasheo—Defendant 1—Applicant.

v.

Vithoba and others—Defendants 2-5—Non-applicants.

Misc. Judicial Case No. 33-B of 1925, Decided on 20th November 1926, from the judgment D/- 11th July 1925, in Second Appeal No. 178-B of 1924.

Civil P. C., O. 47, R. 1—Erroneous view of law—“Other sufficient reason” explained.

Erroneous view of law is no ground for review. The words “any other sufficient reason” in R. 1 mean a reason sufficient on grounds at least analogous to those specified immediately previously: *A. I. R. 1922 P. C. 112, Foll.* [P 368, C 1,2]

M. R. Bobde—for Applicant.

H. S. Gour and N. G. Bose—for Non-applicants.

Order.—On the present application for review of the judgment of this Court dated 11th July 1925, coming on for hearing, counsel for the non-applicants raised an objection that no review lay having regard to the provisions S. 114 and O. 47, R. 1, Civil P. C. It was urged that, avowedly, there had been no discovery of any new and important matter or evidence, that there was no mistake or error apparent on the face of the record, and that there was no other sufficient reason for granting the review.

On behalf of the applicant a considerable argument was developed to the effect that this Court had omitted to appreciate the full force of the words : at the commencement of this law, has either by himself or by himself and through his predecessor-in-title, sub-tenant or mortgagee in possession, held land continuously from a date previous to the first day of June 1895,

in S. 47, Berar Alienated Villages tenancy Law, 1921. It was urged that the tenant had been out of possession from March 1921 to 1st June 1922, and that, in those circumstances it was impossible to hold that he had been holding the land continuously. This point was fully considered by me in the judgment in question, and whether my decision thereon is correct or not, it is only too obvious that by no stretch of terms and by no process of forced interpretation could the erroneous view on this point, assuming it to be such on the legal question involved, be deemed to fall within the provisions of R. 1, sub-R. (1), of O. 47. The question of the interpretation of the said rule has been discussed at length by their Lordships of the Privy Council in *Chhajju Ram v. Neki* (1) and on the principles laid down therein, the present application for review clearly, in my opinion, does not lie for the reasons stated therein.

It has again been urged that in ground 4 of the appeal to this Court it was urged that findings should have been given by the trial Court on the questions of the alleged voluntary surrender of the field and of limitation. The question of limitation was duly considered by me, as was also the the question of surrender, and not the slightest ground exists for the present application succeeding in this connexion. Very obviously no new and important matter or evidence has been discovered. The very fact that counsel, who appeared in support of the application had to enter into a detailed argument on the alleged mistake of law made by this Court, proves that the said mistake or error, if it exists, is not one apparent on the face of the record.

Finally, as regards the words “any other sufficient reason” in the rule referred to, it is impossible to bring any of the grounds under this category in view of the fact that their Lordships of the Privy Council have construed the said term as meaning

a reason sufficient on grounds at least analogous to those specified immediately previously.

In the connected application of *Sheoram*, which is also disposed of by this order, it has been suggested that the case should have been remanded for a

(1) *A. I. R. 1922 P. C. 112=3 Lah. 127=49 I. A. 144 (P. C.).*

decision on the question of ejectment which was said to have been in dispute. The two connected suits were tried and contested on a common basis and, as pointed out by me, the fact of the so-called ejectment was, to all intents and purposes, admitted. It is too late now to resuscitate a question which has lain at rest ever since the initial stage of the suit and there is, in my opinion, no room whatever for review in this connexion.

Both applications for review are accordingly dismissed. I fix Rs. 30 as pleader's fee.

D.D. *Applications dismissed.*

A. I. R. 1927 Nagpur 369 (1)

FINDLAY, J. C.

Kanhai—Defendant—Appellant.

v.

Vyankatrao Gujar—Plaintiff—Respondent.

Second Appeal No. 226 of 1927, Decided on 30th June 1927, from decree of Dist. Judge, Nagpur, D/- 31st January 1927, in Civil Appeal No. 114 of 1926.

Civil P. C., S. 11—Contest between co-defendants—Rights fully adjudicated—Matter can be res judicata between them.

A matter may be res judicata in a subsequent suit, although the parties in such subsequent suit were arrayed as co-defendants in the previous suit, if the matter in dispute in the second suit was directly and substantially in issue in the former one, especially when there is a contest inter se between the defendants in the previous suit and their rights are then fully adjudicated upon. [P 369 C 2]

G. R. Pradhan—for Appellant.

Judgment.—I have heard the pleader for the appellant in this case, but can see no ground for differing from the view taken by the Judge of the lower appellate Court on the question of res judicata. Reliance has been placed by the pleader for the appellant on the decisions in *Moolchand Doulat v. Moolchand Khubchand* (1) and in *Laxman v. Janoo* (2), but even on the authority of these decisions, it appears to me that in Suit No. 38, of 1922 there was a contest between the two then defendants Kanhaya and Venkat Rao inter se, as is shown by issues 1 and 2 framed in that suit, and that their respective rights were fully adjudicated upon.

(1) [1903] 16 C. P. L. R. 42.

(2) A. I. R. 1924 Nag. 425=20 N. L. R. 197.

I am aware of the decision in *Brojo Behari Mitter v. Kedar Nath Mozumdar* (3), but, for my own part, I prefer to follow the view taken by a Bench of the Madras High Court in *Madhevi v. Kelu* (4). It seems to me that a matter may be res judicata in a subsequent suit, although the parties in such subsequent suit were arrayed as co-defendants in the previous suit, if the matter in dispute in the second suit was directly and substantially in issue in the former one. This can undoubtedly be predicated of the circumstances of the present case and, in my opinion, there was undoubtedly a contest inter se between the two present parties as defendants in the previous suit. Their rights were then fully adjudicated upon and the law of res judicata seems to apply proprio vigore and to prevent the matter being reopened now.

The appeal is accordingly dismissed without notice to the respondent.

R.K. *Appeal dismissed.*

(3) [1886] 12 Cal. 570 (F. B.).

(4) [1892] 15 Mad. 264.

A. I. R. 1927 Nagpur 369 (2)

FINDLAY, J. C.

Pandurang and another—Plaintiffs—Applicants.

v.

Mt. Rahi and others—Defendants—Non-applicants.

Misc. Jud. Appn. No. 11 of 1927, Decided on 18th July 1927, for permission to appeal in forma pauperis from the decision of 1st Cl. Sub-Judge, Nagpur, in Civil Suit No. 47 of 1924, D/- 30th November 1926.

Registration Act, S. 17 (3)—Deed disposing of property and giving authority to adopt in case of death is not compulsorily registrable.

Where a deed described a certain person as the heir of all the executants' moveable and immovable property and empowered the wife of the executant to adopt that person in the event of the executant not recovering from the illness from which he was then suffering.

Held: the deed was both a will and a document containing an authority to adopt and was not compulsorily registrable: A. I. R. 1927 P. C. 162 and 25 Mad. 30, D st.

[P 370, C 1]

R. N. Padhey—for Applicants.

V. R. Dhoke and V. D. Kale—for Non-applicants 1 and 2.

Order.—The applicants, who were plaintiffs in the lower Court, desire to appeal in forma pauperis against the judgment and decree of the First Subordi-

nate Judge, 1st Class, Nagpur, dismissing their suit for a declaration that the adoption of defendant 2, Baliram, by defendant 1, Mt. Rahi, was invalid.

I have heard the parties in the case on the question whether the proviso to R. 1, O. 44, Civil P. C., applies or not and, after perusing the record, I can see not the slightest reason for supposing that the judgment and decree of the lower Court are in any respect contrary to law or erroneous or unjust. Everything depends on whether the so-called *adyna patra* can be held to be admissible or not. Again, in this connexion, the question is whether this document can be considered to be a will or not. On that point, after perusing its terms, I have not the slightest doubt. The testator, after stating that Baliram belongs to his family, being the paternal uncle's son says as follows :

He should have ownership (over the property) and I desired much to take him in adoption.

The deed also describes him as the heir of all his moveable and immovable property and goes on to empower his wife to adopt Baliram in the event of the testator not recovering from the illness from which he was then suffering. In those circumstances, it is perfectly clear that, in spite of its title, D. 1 is, in effect, a will as well as a document containing an authority to adopt. It, therefore, falls under S. 17 (3), Registration Act and was not compulsorily registrable.

A case like *Jagannath Bheema Deo v. Kunja Behari Deo* (1) has no application whatever in the present instance, because there was therein no disposal of property, whereas, in the present case, there undoubtedly was a disposal of the property. A similar remark applies to *Somasundara Mudaly v. Duraisami Mudaliar* (2), because in it also there was no disposal of property, but a mere direction that, after the then appellant had been adopted, the widow should put him in possession of the property. As I read the terms of the present document, there was an express provision that Baliram should, in any event, have the ownership of the property and it follows, therefore, that the lower Court was correct in holding that the will was a valid one.

I may add that, from other points of

(1) A. I. R. 1922 P. C. 162=44 Mad. 733 = 45 I. A. 482 (P. C.).

(2) [1904] 27 Mad. 30.

view, the plaintiffs' suit was an equally hopeless one. Clearly, limitation in the case was governed by Art. 118, Lim. Act, the specific article applicable, and not by Art. 125, which is entirely inapposite.

Still further, it is perfectly obvious that the applicants have failed to establish the fact of their being the nearest reversioners. There was no proof that both the lines concerned came from a common ancestor. The alleged admission and conduct of Bapu was all too flimsy a basis on which the contention urged by the plaintiffs-applicants in this connexion could succeed.

I see no ground whatever for interference and the application is accordingly rejected. I fix Rs. 25 as pleader's fees.

N.K.

Application dismissed.

A. I. R. 1927 Nagpur 370

MITCHELL, A. J. C.

Zingraji Dhangar — Plaintiff—Appellant.

v.

Nagosa Kalal — Defendant — Respondent.

First Appeal No. 37-B of 1925, Decided on 28th October 1926, from decree of 1st Class, Sub-Judge, Amraoti, in Civil Suit No. 37 of 1924, D/- 25th February 1925.

Damages—Sale of land—Purchaser evicted—Intention of parties in contract will determine measure of damages — Purchaser made known the defect in title—Indemnity to compensate in case of eviction — Vendor is liable to return price received.

In a claim for damages by a purchaser of land on account of eviction therefrom, the damages must be determined according to what may be deemed to have been the intention of the contract between the parties to the sale.

The English principle, that the measure of damages is the value of the land at the date of eviction cannot be accepted as a hard-and-fast rule applicable to Indian conditions. The circumstances of each contract must be examined and the intention of the parties determined : *A.I.R. 1924 Nag. 257 Foll. [P 371 C 2, P 372 C 2]*

D's widow sold certain fields to N in 1908. N sold the fields to Z in 1911, disclosing in the sale-deed that he had bought the fields from a widow, but giving Z an indemnity in case his title should be disturbed. D's reversioners evicted Z in 1923.

Held : that Z would be entitled only to the purchase-money paid to N and not the market value of the land in 1923.

Held : further that, Z would not be entitled to compensation for any improvements made by

him as indemnity by *N* did not extend to any such improvements. *Z* might claim compensation for improvements from *D*'s reversioners if he could prove his good faith. [P 373 C 1]

M. B. Niyogi—for Appellant.

A. V. Khare—for Respondent.

Judgment.—Dhansa Kalar of Kamalapur died in 1907, and his wife, Mt. Ananda, took his lands in widow's estate. On 16th April 1908, she sold survey 2/1 to Nagosa of Hartoli for Rs. 700. On 5th June 1908, she sold survey 6 to the same Nagosa for Rs. 500. On 29th April 1911 Nagosa sold both these fields to Zingraji of Kamalapur by a sale-deed which referred specifically to the previous sale-deeds, giving their serial numbers in the books of the registration office. The sale-deed professed to convey a full and unlimited title in the fields, and it contained an indemnity clause to the effect that if anyone should make a claim Nagosa would be responsible for it and Zingraji would not be put to any expense thereby. As Zingraji lived in Kamalapur, where the fields are situated and where Dhansa lived and died, and as Nagosa's own title-deeds were clearly cited in the sale-deed, it cannot be doubted that Zingraji knew that he was buying from Nagosa landed property which Nagosa had bought from a widow who had inherited it from her husband; and indeed this fact was definitely pleaded by Nagosa and not denied by Zingraji.

Ananda died about 12 years later, and her reversioners sued both Nagosa and Zingraji for possession of these fields, in suit No. 127 of 1923, in the Court of the Subordinate Judge, Amraoti. They got a decree on 4th February 1924, and obtained possession of the fields from Zingraji on 3rd May 1924.

Zingraji now sues Nagosa for compensation for the loss of his fields. The lower Court decided that Zingraji was entitled to compensation, and held that the measure of the compensation was the price paid in 1911, and not the market value of the fields on the date of eviction in 1924. The lower Court refused Zingraji's claim for compensation for clearing the land, building a well, erecting an embankment and planting fruit trees. It awarded a decree for Rs. 1,425 only, which was the price paid by Zingraji in 1911.

Only two points are raised in appeal: one relating to the measure of the value of compensation, and the other relating to

the claim for improvements. Zingraji still claims that he is entitled to the market value of the fields on the date of his eviction, and to the money he spent on improving the fields. It is convenient to consider these two points quite separately, and, in the first instance, to discuss the measure of compensation on the assumption that no improvements had been made.

The appellant relies upon the authority of *Nagardas Saubhagyadas v. Ahmedkhan* (1), which the lower Court has refused to accept in face of the ruling of the local High Court in *Mohammad Razzak v. Amrutrao* (2). The former case lays down the definite authority that a purchaser evicted from his holding is entitled to recover from a vendor who has guaranteed his title the value of the land at the date of eviction.

The latter case enunciates the more conservative proposition that in a claim for damages by a purchaser of land on account of eviction therefrom the damages must be determined according to what may be deemed to have been the intention of the contract between the parties to the sale.

The circumstances in this latter case are similar to the circumstances in the present appeal, and the lower Court acted rightly in following the local authority. In this Court, however, the general principles underlying this obscure point have been fully discussed and I am asked to follow the definite rule of law stated in *Nagardas Saubhagyadas v. Ahmedkhan* (1).

That judgment discussed both the English and the American law on the subject and points out, with reference to S. 73, Contract Act, that

the legislature has not prescribed a different measure of damages in the case of contracts dealing with land from that laid down in the case of contracts relating to commodities.

It accepts the English rule on the point and applies the principle contained in S. 73, Contract Act, and decides that the measure of damages is the value of the land at the date of eviction.

With all respect I think that this principle cannot be accepted as a hard-and-fast rule applicable to Indian conditions.

In the first place, the analogy of S. 73, Contract Act, is not a close one. In cases like the present there has been no breach of contract. There is probably no man more desirous that the contract should stand than Nagosa himself. Again S. 73

(1) [1897] 21 Bom. 175.

(2) A.I.R. 1924 Nag. 257=20 N.L.R. 55.

relates to ordinary business contracts of which the sale of goods and the hire of transport are typical; all the illustrations, except two, fall within these two descriptions. In such transactions the periods of time contemplated by the parties are short and the variation in price of the goods sold or damages otherwise caused vary within known and fairly obvious limits. Each side to the contract has a very clear idea of the liabilities it is undertaking but, as shown in the next paragraph of this judgment, where land is sold in India, the period of an indemnity given by the vendor to the purchaser may last for many decades, and in the interval the price of land may have varied to an extent beyond the imagination of the parties to the contract. This is particularly true in Berar where the rise in the values of land since 1911 has been phenomenal. Again, S. 73 itself makes an exception in the case of "remote and indirect loss sustained by reason of the breach." It is reasonable to argue that the rise in price of land between 1911 and 1924 is an indirect result which was not in the minds of the parties in 1911. On the whole the analogy of S. 73 does not appear to be very strong.

In the second place, the adoption of a principle of English law in such cases should only be made with extreme caution. It is possible that in England the indemnity given to a purchaser of land may subsist for long intervals, but it is likely that such cases will not arise so frequently as they do in India. Two leading examples will be sufficient to illustrate this. Alienations by the manager of a Hindu family may be challenged by his minor sons when they attain majority, and in these cases the period of the indemnity may be anything up to 18 years. Again, a Hindu widow taking her husband's estate under the Hindu law obtains a full estate, subject only to certain limitations, of which the chief is that her alienations will not extend beyond her own lifetime and may be set aside on her death by her reversioners. Considering the early age of marriage in India it is possible in many cases that the period elapsing from the date of an alienation by a widow to her death may extend to half a century or more. In view of these peculiarities of the Hindu law it will be safer to accept English precedents only when all the circumstances furnish an

exact parallel, and to avoid any hard-and-fast rule based on English practice.

This is what has been done by my brother Kotval in *Mohammad Razzak v. Amrutrao* (2). He has accepted neither the English rule nor the American rule, but has stated the sound principle that the circumstances of each contract must be examined and the intention of the parties determined.

If the circumstances of the present case are stated, and the above broad rule applied, the following result is obtained: Dhansa's widow sold certain fields to Nagosa in 1908. Nagosa sold the fields to Zingraji in 1911, disclosing in the sale-deed that he had bought the fields from a widow, but giving Zingraji an indemnity in case his title should be disturbed. Dhansa's reversioners evicted Zingraji in 1923. In the meantime the value of the land had appreciated very considerably. These circumstances show that Nagosa and Zingraji were aware of the defective nature of the title when they entered into the contract of sale in 1911, and it would be unfair to saddle Nagosa now with the payment of compensation based on a high value of the land which neither of the parties could possibly contemplate in 1911. I hold with the lower Court that Zingraji is entitled to the return of his purchase-money.

It may seem unfair to Zingraji that he should now lose the fields which he values at Rs. 2,500 and should receive as compensation only Rs. 1,425; but it must be remembered that Zingraji knew from the outset that his title was defective, and that he has held these lands throughout the period of their appreciation on a rent which is the equivalent only of the interest on his outlay of Rs. 1,425. The other side of the question must also be considered. Nagosa disclosed his defective title in 1911 and there is no express provision in the sale-deed whereby he guaranteed to Zingraji the future value of the fields, no matter how high their price might rise.

Coming now to the question of improvements: Zingraji may be entitled to recover the money he has spent on these fields while he was in possession of them under what was a perfectly legal title up to 1924, if he can show that he acted in good faith under the genuine belief that his title was good; but it does not seem to be equitable to saddle Nagosa with

this additional burden. It cannot be said that his indemnity guaranteed to Zingraji compensation for fruit trees, wells, embankments and other expensive improvements which Zingraji might choose to make. For this particular loss on the part of Zingraji there is a special remedy provided for him in S. 51, T. P. Act. The persons who are benefited by these improvements are the reversioners of Dhansa who have taken possession of the fields, and S. 51 gives Zingraji the right to claim from them the value of his improvements if he can establish that he acted in good faith under the genuine belief that his title was good. If, however, he made these improvements, knowing that he might be dispossessed by Dhansa's reversioners, then the risk may fairly be held to be his own.

The appeal fails and is dismissed with costs.

G.B.

Appeal dismissed

A. I. R. 1927 Nagpur 373

HALLIFAX, A. J. C.

Abdul Karim—Plaintiff—Appellant.

v.

Lutudhar—Defendant—Respondent.

First Appeal No. 15 of 1925, Decided on 16th December 1926, from decree of Addl. Dist. Judge, Raipur, D/- 30th September 1924, in Civil Appeal No. 27 of 1923.

Civil P. C., S. 2 (12)—No suit is maintainable for mesne profits by lessee for period subsequent to expiry of lease on dispossession by lessor.

In 1916 the defendant gave the plaintiff a lease of a forest of which the term was to expire on the 23rd August 1921. In 1918 defendant filed a suit, alleging that the lessee had broken the contract in various ways, and claiming damages and cancellation of the lease; and he ousted plaintiff from possession of the forest on the 24th June 1918 by obtaining a temporary injunction. Defendant's suit was decreed by the trial Court but in appeal the claim for damages only was granted, and that for cancellation of the lease was rejected on the 5th September 1919.

On the 4th November 1921 plaintiff made an application under S. 144, claiming to be restored to possession and to be paid mesne profits for the period during which he had been kept out of possession.

Subsequently plaintiff admitted that he could not be put in possession upon the expiry of the period of the theka. The claim for mesne profits for the period between June 1918 and August 1921 was rejected on the 22nd July 1922.

On the 22nd November 1923 plaintiff filed a suit claiming the profits that he would have got out of the lease during the year 1921-22 on the ground that, though the term of the lease expired in August 1921, the contract gave the lessee the right to remove, within one year thereafter, everything that he had collected but had not removed up to that time.

Held: that the suit would not be maintainable. If the plaintiff was entitled to possession at all, he could only get it by an application made under S. 144, but he could not get it even in that way, as he gave up his claim to it in the previous proceedings and he could not on that ground claim mesne profits. Up to the date of the decree the dispossession was under the injunction, and profits could be recovered only by suit; after it, they could be recovered only by application under S. 144.

*Hari Singh Gour and Abdul Razak—*for Appellant.

*B. K. Bose and D. N. Choudhry—*for Respondent.

Judgment.—Most, if not all, of the difficult questions discussed at length in both Courts would have been seen not to arise if the facts had been properly examined. In 1916 the defendant, Lutudhar, gave the plaintiff, Muhamad Abdul Karim, a lease of a forest of which the term was to expire on the 23rd August 1921. In 1918 Lutudhar filed a suit, alleging that the lessee had broken the contract in various ways, and claiming damages and cancellation of the lease; and he ousted Abdul Karim from possession of the forest on the 24th June 1918 by obtaining a temporary injunction from the Court in that suit. Both reliefs claimed were granted by the first Court, but in appeal to the Court of the District Judge the claim for damages only was granted, with a modification of the amount to be paid, and that for cancellation of the lease was rejected. This was on the 5th September 1919.

On the 4th November 1921 Abdul Karim made an application to the Court under S. 144, Civil P. C., claiming to be restored to possession of the property and to be paid mesne profits for the period during which he had been kept out of possession. He seems to have waited for the decision of the appeals which were filed in this Court and were dismissed, though he was of course entitled to possession immediately after the decision of the appeal in the District Judge's Court.

In reply to his application it was pointed out that the term of the lease had expired more than two months before the application was made, and he admit-

ted in a written statement that he could "not now be put in possession of his theka consequent upon the expiry of the period of the theka." The claim for mesne profits for the period between June 1918 and August 1921 was then examined alone and was rejected on the 22nd July 1922.

On the 22nd November 1923 Abdul Karim filed the suit out of which this appeal arises, claiming the profits that he would have got out of the lease during the year 1921-22, that is to say, the year beginning on the 23rd August 1921, which is the day on which the term of his lease ended. That this fact passed unnoticed in the lower Court, and was not even mentioned in the argument of the appeal, can hardly be called extraordinary, though it ought to be impossible.

At the beginning the plaintiff himself seems to have seen the absurdity of asking for the profits he would have made in the period during which he was not entitled to possession, as it is stated in para. 5 of the plaint that, though the term of the lease expired in August 1921, the contract gave the lessee the right to remove, within one year thereafter, everything that he had collected but had not removed up to that time. The deed of lease has not been produced and that is the only reference in the whole case to any such condition, so that it must be held that it did not exist.

But even if such a condition had been proved to be included in the lease, and the suit were otherwise maintainable, the utmost the plaintiff could claim would be the value of so much produce as he would have left unremoved in the forest at the end of a normal year's working. He has claimed the value of all he would have got during such a year, and the case has been tried on the assumption that the period of the lease itself terminated in August 1922.

But, even if that were correct, the suit would not be maintainable at all. If the plaintiff was entitled to possession at all, he could only get it by an application made under S. 144, Civil P. C., and now he could not get it even in that way as he gave up his claim to it in the previous proceedings; if he himself declined to take the possession to which he was entitled he cannot, of course, claim mesne profits. Further, if he could, the claim

could not be enforced in a suit but only by application under S. 144.

That the plaintiff's only remedy was that provided by S. 144 is another matter that it is not a little astonishing to find passing unnoticed, as he had previously tried to obtain it in that way. The confusion of thought in the whole case is further exemplified by the fact that the period to which the application under S. 144 related included that between the injunction and the decree of the first Court, which was passed on the 14th April 1919, and this suit relates to a period subsequent to that decree. Up to the date of the decree the dispossession was under the injunction, and profits could be recovered only by suit; after it they could be recovered only by application under S. 144.

The reasons given in the judgment of the lower Court for dismissing the suit can hardly be called correct in themselves and anyhow they are irrelevant. The dismissal is, however, correct. The appeal will accordingly be dismissed and the plaintiff-appellant will be ordered to pay all the costs in both Courts.

G.B.

Appeal dismissed.

A. I. R. 1927 Nagpur 374

HALLIFAX, A. J. C.

Atmaram—Decree-holder—Appellant.
v.

Mt. Radha Bai—Judgment-debtor—Respondent.

Second Appeal No. 230 of 1926, Decided on 30th March 1927, from decision of Dist. Judge, Wardha, D/- 8th January 1926, in Civil Appeal No. 87 of 1927.

Civil P. C., S. 60 (1) (c)—A female occupancy tenant not cultivating field herself can be agriculturist.

Where a widow inherited from her husband an occupancy field of 3.50 acres, a house said to be worth Rs. 500 and a kotha worth about Rs. 50, all in the same village, and the widow never cultivated the holding herself, but sub-let it every year since her husband's death, she having no bullocks for purposes of cultivation.

Held: that the house and kotha must be regarded as occupied by the widow as an agriculturist and thus exempt from attachment: 16 N. L. R. 89, *Foll.* [P 375 C 1]

*G. R. Deo—*for Appellant.

*V. R. Pandit—*for Respondent.

Judgment.—A decree for the payment of Rs. 633, to the appellant Atmaram was

passed on the 19th January 1921 against the respondent Radha Bai as the legal representative of her deceased husband Baliram, who died about the year 1912. She inherited from him an occupancy field of 3.50 acres, a house said to be worth Rs. 500 and a kotha worth about Rs. 50, all in the same village, and probably also some moveable property. On an application for execution of the decree filed in January 1924 the house and kotha were attached. Of the various reasons put forward on behalf of Radha Bai for the contention that both buildings should be released from attachment we are now concerned with one only. That is, that they are exempt from attachment under Cl. (c), S. 60 (1), Civil P. C., as she is an agriculturist and they belong to her and are occupied by her.

It appears that Radha Bai has never cultivated the holding herself, but has sub-let it every year since her husband's death. She has no bullocks, having given away a pair she once owned to her son-in-law, but she seems to have two cows which she keeps in the kotha that was attached. She lives in the house. The learned District Judge has held that both buildings are exempt from attachment because Radha Bai is an agriculturist and does occupy them.

The matter is not quite as simple as that. Unless we read the words "as such" at the end of Cl. (c), S. 60 (1), Civil P. C., or rather read the word "him" at the end of it as meaning "the agriculturist as such" we get impossible results. One would be the exemption from attachment of the residential mansion of a millionaire banker who is also a tenant of a few acres of land. That is perhaps an extreme case, but others of the same kind are easy to imagine. If a man who is mainly an agriculturist and cultivates his own land has a grocery shop in a house other than his residence, even in the same village, would the shop building be exempt from attachment? It certainly would on the learned District Judge's reading of Cl. (c).

It seems, however, on the same reasoning as that in *Amolaksao v. Eknath* (1), that the house and kotha attached in this case must be regarded as occupied by Radha Bai as an agriculturist. The sub-leases she gives are not and cannot be for more than one year at a time, and even if she does in fact go on sub-letting

the land all her life, it can still be said that it is necessary for her to live in that house to look after the sub-letting of the holding, that is, for the purposes of agriculture. As a matter of fact the possibility, if not the probability, of her starting to cultivate the land herself is greater than that of the judgment-debtor in the case that has been mentioned.

It has been urged for the decree-holder that, in view of the smallness of the holding, the kotha is sufficient for all Radha Bai's needs as an agriculturist, even if she ever takes up the cultivation of it herself, and still more if she continues to sub-let it, and therefore the house ought to be considered liable to attachment. Such a distinction ought certainly to be made where it is possible, as in the imaginary case of the agricultural grocer already mentioned, but it is impossible to make it here. The dividing line between what Radha Bai does and does not need as an agriculturist would pass through her residential house, as it could hardly be said that even a tenant of no more than three and a half acres would be sufficiently accommodated in a kotha meant and used for cattle.

The appeal will be dismissed, but, in the circumstances, it appears that the decree-holder ought not to pay the costs of the judgment-debtor. It will accordingly be ordered that each party shall pay its own costs in all three Courts.

D.D.

Appeal dismissed.

A. I. R. 1927 Nagpur 375

FINDLAY, J. C.

Amdu and others — Plaintiffs—Applicants.

v.

Fazal—Defendant—Non-applicant.

Civil Revn. No. 351 of 1925, Decided on 20th November 1926, from order of Dist. Judge, Bhandara, D/-16th September 1925, in pending Civil Suit No. 3 of 1925.

Court-fees Act, S. 7 (iv) (d)—Injunction—Plaintiff can value as he likes.

Whatever the legislature may have intended, the clear meaning of S. 7 implies that the plaintiff in a suit with consequential relief of injunction is at liberty to assign any value to the relief he claims: *A. I. R. 1921 Bom. 65*; *A. I. R. 1924 Nag. 316* and *A. I. R. 1918 P. C. 135*; *Foll.* [P 376 C 1]

Y. V. Jakatdar—for Applicants.

Abdul Rahim—for Non-applicant.

(1) [1920] 16 N. L. R. 89=55 I. C. 481.

Order.—The facts of this case are sufficiently clear from the application itself, as well as from the order of the lower Court dated 16th September 1925. As is clear from the order-sheet of the said date, the plaintiffs-applicants were ordered to pay Rs 1,255 extra Court-fees, having regard to the value of the subject-matter of the suit. The learned District Judge, in coming to the decision he did on this point, relied on the decisions in *Harihar Prasad Singh v. Shyam Lal Singh* (1) and *Dayaram v. Gordhandas* (2). These cases have been fully considered by a Bench judgment of this Court in *Krishnarao v. Chandrabhagabai* (3), decided by Biker, J. C., and Prideaux, A. J. C., on the 24th April 1924, and I do not find it necessary to add much to the said judgment. It is pertinent, however, to point out that the decision in *Raj Krishna Dey v. Bipin Behari Dey* (4) was expressly dissented from by the Bombay High Court in *Gorinda v. Hanmaya* (5), wherein it was pointed out that whatever the legislature may have intended, the clear meaning of S. 7, Indian Court-fees Act, implies that the plaintiff was at liberty to assign any value to the relief he claims. Still further, this principle was affirmed by their Lordships of the Privy Council in *Sunderlai v. Collector of Belgaum* (6). It is clear, therefore, that the plaintiff was entitled to value consequential relief of injunction at any figure he liked, and the order of the lower Court clearly cannot stand.

I would add further that, even if the relief of injunction had been liable to ad valorem fees, it is difficult to understand why the prayer for amendment of the plaint by abandoning this relief was not granted. For the reasons, however, given fully in the Bench judgment of this Court, with which I respectfully declare my agreement, the order of the lower Court, dated the 16th September 1925, clearly cannot stand, and the lower Court must proceed with the trial of the suit on the plaint as it stands at present.

The order, dated the 16th September

1925, is accordingly set aside and the lower Court will proceed with the trial of the suit in accordance with the above remarks. The costs of the present revision application will follow the event. I fix Rs 40 as pleader's fees.

D.D.

Order set aside.

A. I. R. 1927 Nagpur 376

KINKHEDE, A. J. C.

Ramrao Hiji—Defendant—Appellant.
v.

Dattatrayakrishna — Plaintiff — Respondent.

Second Appeal No 18-B of 1925, Decided on 22nd July 1927, from a decree of the Addl. Dist. Judge, Amraoti, D/- 1st November 1924, in Civil Appeal No. 195 of 1922.

Landlord and Tenant—Uniformity of rent and long possession are not sufficient to raise a presumption of permanent tenancy.

The mere circumstance of the uniformity of rent and long possession does not suffice to raise a presumption of permanent tenancy: *A. I. R. 1924 P. C. 65, Foll.* [P 376 C 2]

N. B. Bose—for Appellant.

M. V. Joshi and R. R. Jaiwant—for Respondent.

Judgment.—I am asked to interpret the order of my brother Kotval, A. J. C., remanding the case as embodying a decision that long-continued possession and uniform rent give rise to a presumption of permanency. On the other hand, the respondent's learned advocate contends that all that Kotval, A. J. C., did was to indicate the possibility of a presumption being raised in the circumstances of the case and not that it actually arises on the facts found. I think the respondent's contention is sound. Since Kotval, A. J. C., appears to have asked the Court below to decide the second issue afresh there can be no doubt as to his intention to leave the matter to the Courts below to decide in the manner they think best in the light of the presumption, if any, justifiable on the facts found. In the case which went to the Privy Council from the Madras High Court, and reported as *Nainapillai Marakayar v. Ramanathan Chettiar* (1), it was held that the mere circumstance of the uniformity of rent and long possession does not suffice to

(1) [1913] 40 Cal 615 = 21 I. C. 404.

(2) [1907] 31 Bom. 43 = 8 Bom. L. R. 885.

(3) A. I. R. 1924 Nag. 316

(4) [1913] 40 Cal. 245 = 16 C. L. J. 191 = 17 I. C. 162 = 17 C. W. N. 591.

(5) A. I. R. 1921 Bom. 65 = 43 Bom. 567.

(6) A. I. R. 1918 P. C. 135 = 43 Bom. 376 = 45 I. A. 15 (P. C.).

(1) A. I. R. 1924 P. C. 65 = 47 Mad. 337 = 51 I. A. 83 (P. C.).

raise such a presumption. I am, therefore, constrained to hold that the Courts below have rightly decided the case. The appeal fails and is dismissed with costs.

N.K.

Appeal dismissed.

A. I. R. 1927 Nagpur 377

FINDLAY, J. C.

Darbari Lal—Plaintiff—Appellant.

v.

Hazarilal—Defendant—Respondent.

Second Appeal No. 375 of 1926, Decided on 30th June 1927, from decree of Dist. Judge, Nagpur, D/- 29th March 1926, in Civil Appeal No. 113 of 1925.

Transfer of Property Act, S. 6—Right to recover profits accrued due from lambardar can be transferred.

The right to recover profits from a lambardar, which have accrued due, is not a mere right to sue and sale of such right is not invalid: *A. I. R. 1926 Nag. 396* *Foll.*; *A. I. R. 1924 Cal. 1047*, *Diss. from.* [P 377 C 2]

V. R. Dhoke—for Appellant.

A. V. Wazalwar—for Respondent.

Judgment.—The plaintiff-appellant bought a four annas share in mouza Kanhargaon Nagpur from the former malguzar Rajkumar. He brought the present suit for profits from the defendant-respondent, the village lambardar for the years 1921-1922, 1922-1923 and 1923-1924. The main facts of the case are sufficiently clear from the judgment appealed against, and three questions arise for decision in the present second appeal. The first of these is as to whether the learned District Judge was correct in holding that the plaintiff could not claim profits for the year 1921-22, these having accrued in favour of the plaintiff's predecessor-in-title before the sale. The learned District Judge, relying on an unreported decision of Batten, A. J. C., in *Second Appeal No. 736 of 1915, decided on the 19th March 1917*, held that the claim for profits of the year in question could not be sustained as the sale amounted to a mere assignment of a right to sue within the meaning of S. 6, Cl. (e), T. P. Act. Shortly after the learned District Judge gave his decision, an authoritative case on this point was published viz., *Lachmi Narayan v. Dharamchand* (1), and it is obvious that *prima facie* this decision must now be given effect to

by me unless, as I have been asked by the pleader for the respondent to do, I see cause to doubt the propriety or correctness of the reported decision and refer the question at issue to a Full Bench.

Considerable stress has been laid by the pleader for the respondent on the decision of Suhrawardy and Graham, J.J., in *Khettra Mohan Das v. Bisua Nath Bera* (2), but, for my own part, I am unable to concur in the reasoning contained in that decision and the great weight of case authority, as has been pointed out by Hallifax, A. J. C., in the case quoted above, is to a directly contrary effect. Apart from the case authority, however, I can see no reason whatever for supposing that the right to claim profits, previously accrued on a property like the present one sold to the plaintiff-appellant—profits a right, in this instance expressly transferred—does not amount to an actionable claim within the meaning of the definition contained in S. 3, T. P. Act. On the other hand, I fail to understand how the right to claim a debt like the present one in respect of the profits for the year 1921-22 can be described with any propriety as the transfer of a mere right to sue. In view of the deliberate inclusion of the past profits for the year in question in the sale, it seems to me clear that there was a valid transfer conveyed to the present appellant of the right to sue for these profits. I can, in short, see no reason whatever for differing from the decision of Hallifax, A. J. C., quoted above and I may add that a corresponding view, in which I entirely concur, was taken by Drake-Brockman, J. C. in *Second Appeal No. 111 of 1911, decided on 13th November 1912*. I am of opinion, therefore, that the learned District Judge erred in holding that the profits for the year 1921-22 were not recoverable. (After considering the evidence the judgment proceeded) The best course in the present case will be to remand the appeal to the lower appellate Court which will, in its turn be at liberty to remand the case to the first Court for findings on specific issue relating to the points left undetermined. I may add, however, that, in my opinion, the question of the alleged profits from timber must be considered as closed and should not be allowed to be re-opened.

The judgment and decree appealed against are accordingly reversed and the

(1) A. I. R. 1926 Nag. 396 = 22 N. L. R. 108.

(2) A. I. R. 1924 Cal. 1047 = 51 Cal. 972.

case is remanded to the lower appellate Court, for disposal of Civil Appeal No. 113 of 1925 on the merits with advertence to the above remarks. There will be no certificate of refund of Court-fees. Other costs of this appeal will follow the event.

R.D.

Decree reversed.

A. I. R. 1927 Nagpur 378

FINDLAY, J. C.

Ganpat and others—Plaintiffs — Appellants.

v.

Laxman Rao — Defendant — Respondent.

Second Appeal No. 32 of 1926, Decided on 3rd December 1926, from decree of A. Ill. Dist. Judge, Nagpur D/- 26th October 1925, in Civil Appeal No. 54 of 1925.

(a) *Practice*—New plea.

Where a claim to easement on the ground of prescription fails, the party cannot be allowed in second appeal to set up a claim based on custom or grant. [P 378 C 2]

(b) *Possessory Title* — Ownership — Rights attached to, described.

A person is entitled to enjoy his own land in the way he chooses to do, unless he interferes with his neighbours or causes them injury or inconvenience. [P 378 C 2]

M. R. Bobde and M. D. Khandekar — for Appellants.

R. N. Padhey — for Respondent.

Judgment.—The plaintiffs-appellants' suit has been dismissed in both the lower Courts for reasons which are clear from the two judgments in question. The plaintiffs claimed that they had a right to ingress of light and air and to emit smoke through the window E shown in the plan attached to the plaint; that they had also a right to pass on to the vacant land A B C D in order to effect repairs to their wall A D; and, finally, that they had a right to project the eaves two feet to the south of A D. Both the lower Courts have held that the window has not been in existence for more than 15 years and that no prescriptive right of easement had, therefore, been acquired.

It has been contended on behalf of the plaintiffs-appellants in this Court that the right in question might also have been acquired by grant or custom and that the lower Courts have failed to consider this aspect of the case. If there

was to have been any question of the right of easement in question having been acquired by grant or custom, there should have been specific pleading on the point and it is fairly obvious that the contention is now raised for the first time merely because the findings of fact arrived at by the lower Courts have bolted and barred the door against the right of easement having been acquired by lapse of time. It is obviously impossible to admit now a plea which would involve a fresh enquiry into questions of fact as to whether the rights claimed by the plaintiffs were acquired by grant or custom. The obvious principle to be followed in a case like the present is that the defendant is entitled to enjoy his own land in the way he chooses to do unless he interferes with his neighbours or causes them injury or inconvenience. In the present instance the very minute room, shown as H in the plan, has already, besides the window in dispute, another window G, opening on to the compound, and the door H. The inspection-note recorded by the Subordinate Judge suggests that the closing of the window E will necessarily cause some curtailment of the light and air entering the room, but it is impossible, on the evidence on record, to hold that any nuisance will be caused sufficient to justify interference by this Court in the particular circumstances of the present case: cf. *Paul v. William Robson* (1).

As regards the arrangement made for draining of the roof water from the defendant's house, the findings of the Subordinate Judge show that suitable arrangements have been made.

As regards the alleged right to enter on the previously open space A B C D for repairs to the plaintiffs' wall A D, the appellants' case is even a weaker one. I fully concur in this connexion with the decision of Beaman and Heaton JJ., in *Himatlal Maganlal Shah v. Bhikabhai Amritlal Shah* (2). Most obviously, on the evidence in the present case, no right to enter on the defendant's land for purposes of repairs has been made out and this aspect of the case has been correctly dealt with by the lower appellate Court. There has been no proof worthy of the name that any entry on

(1) [1912] 39 Cal. 59=12 I. C. 60.

(2) [1918] 42 Bom. 529=45 I. C. 422=20 Bom. L. R. 403.

the defendant's land was ever exercised by the plaintiffs as of right for purposes of repairs to their own property, and it would have required strong evidence, indeed, to make out a right of any such nature.

The case has undoubtedly been decided correctly by the Courts below and the appeal is accordingly dismissed with costs.

D.D.

Appeal dismissed.

A. I. R. 1927 Nagpur 379

KINKHEDE, A. J. C.

Radhakishan and another—Defendants 1 and 2—Appellants.

v.

Bisansing and others—Plaintiff and Defendants 3 to 8—Respondents.

Second Appeal No. 162-B of 1926, Decided on 24th January 1927, from decision of 2nd Addl. Dist. Judge, Amraoti, D/- 12th February 1926, in Civil Appeal No. 47 of 1925.

(a) *Hindu Law—Joint family—Alienation by major members of joint property—Suit to set aside sale—Consideration for sale, whether for necessity or not, should be distributed over the whole property.*

Three brothers, one of them being a minor, formed a joint family. The major brothers and their mother, on behalf of the minor brother, sold the joint family property. The minor, on attaining majority, brought a suit to set aside a sale for want of necessity. It was found that two-thirds of the consideration was not for necessity and the remaining one-third had benefited the plaintiff.

Held: that, according to accepted equitable principles, in the absence of anything appearing to the contrary, the consideration for the sale must be distributed over the whole of the property sold in proportion to the value of each part. There is no ground for supposing that one portion of the consideration is allocated to a particular share and the other portion to the other share or shares. The valid portion of the consideration, as well as the invalid portion, must be distributed over the shares of the three brothers equally. The consequence of this apportionment is that the plaintiff's one-third share must be treated as charged to the extent of one-third of the valid portion of the consideration: *A. I. R. 1924 Nag. 109 and 37 Mad. 435, Foll.; 12 N. L. R. 161, Diss. from.*

[P 381 C 1]

(b) *Hindu Law—Joint family—Sale of joint family property set aside on payment of valid portion of consideration—Plaintiff is not entitled to mesne profits.*

Where a sale-deed, challenged as being one without necessity, has not been unconditionally set aside, but the plaintiff is held entitled to get it set aside on payment of his quota of the

valid portion of the consideration, the vendee must necessarily be deemed to be lawfully in possession until the sale is set aside, and he is therefore not accountable for mesne profits: *A. I. R. 1918 P. C. 118, Foll.* [P 381 C 1]

A. V. Khare and W. B. Pendharkar—for Appellants.

P. C. Dutt—for Respondents.

Judgment.—One Gulabsing Rajput left at his death three sons by name Dipchand, Kisansing, defendant 3, and Bisansing, plaintiff-respondent 1, and a widow by name Mt. Ani. Gulabsing's property devolved on his sons in equal rights. They formed a joint Hindu family of which defendant Dipchand was the manager. Dipchand and Mt. Ani, on behalf of the minor sons Kisansing and Bisansing, entered into several transactions whereby they mortgaged Gulabsing's property from time to time. These mortgages are dated 18th May 1910, Ex. I D-3 for Rs. 400, 27th January 1912, Ex. I D-2 for Rs. 500, and 11th March 1914 Ex. I D-1 for Rs. 1,000. On 18th March 1918 Dipchand and Kisansing, who had since attained majority, and Mt. Ani on behalf of the plaintiff Bisansing who was still a minor, executed in favour of the appellants-defendants 1 and 2 a sale-deed, Ex. I D-12, for Rs. 3,550, which is made up of Rs. 1,300 due to the purchasers on the mortgage Ex. I D-1, and Rs. 293-5-3 on a bond and khata debt, Rs. 755-11-6 payable to one Mirabai in full satisfaction of mortgage, Ex. I D-2, and Rs. 1,200-15-3 paid in cash before the Sub-Registrar for meeting the marriage expenses of plaintiff. Both the Courts below have held that the item of Rs. 293-5-3 was not for legal necessity. The first Court held that the rest of the consideration of Rs. 3,256-10-9 was justified by legal necessity and therefore upheld the sale to the defendants, but directed them to pay to plaintiff Rs. 97-12-3, which forms one-third of Rs. 293-5-3, for which no legal necessity existed.

Plaintiff therefore appealed to the Court of the Second Additional District Judge, Amraoti. The said Court differed from the first Court with regard to the existence of legal necessity in respect of two items of Rs. 1,300 and Rs. 755-11-6 and confirmed the latter's decision as to the remaining item of Rs. 1,200-15-3. It decreed to the plaintiff joint possession to the extent of one-third share without any payment and further inserted a

direction for inquiry into mesne profits accruing from the date of the suit till delivery of possession.

Defendants 1 and 2 have filed this second appeal against the said decree. They contend that the sale ought to have been upheld as one supported by legal necessity; and, in the alternative, items of Rs. 755-11-6 and Rs. 1,200-15-3, ought to have been held binding as against the plaintiff, or, at any rate, he should have been ordered to refund the amount for which legal necessity was found to exist; and that no decree for mesne profits could have been legally passed. An elaborate argument was addressed on the question of the existence of legal necessity for the several items, which went to constitute the consideration of the sale-deed in question. I have considered the evidence on record and the probabilities of the case, and am of opinion that the lower appellate Court's decision as regards the items of Rs. 1,300 and Rs. 293-5-3, due to the appellants, is unassailable. The finding as to the third item of Rs. 755-11-6 is also not open to challenge in second appeal.

It was contended before me that out of this item of Rs. 755-11-6 the principal sum was Rs. 500 which was made up of two items of Rs. 350 and Rs. 150. As to Rs. 350 the same was said to have been required for payment of a debt due to Yado Purushottam. The lower appellate Court held that though the existence of the debt due to Yado Purushottam was proved, legal necessity therefor was not proved, and that whatever evidence there was on record showed that it had become barred by time. This is a finding which cannot be disturbed in second appeal.

As to the fourth item of Rs. 1,200-15-3: both the Courts have agreed that there was legal necessity for it. This forms very nearly one-third of the consideration for the sale; plaintiff's share of the property is also one-third. According to the findings, the raising of this amount of Rs. 1,200-15-3 was rendered necessary as it was required to meet the expenses of plaintiff's marriage. It is thus clear that this part of the consideration of the sale benefited the plaintiffs personally. It is therefore contended on behalf of the appellants that if the rest of the consideration which forms its $\frac{2}{3}$ rd share is not held to be for legal necessity, the entire consideration of the sale should

be so apportioned between the three coparceners as to uphold the sale of Dipchand and Kisansing's $\frac{2}{3}$ rd share of the property, in lieu of the $\frac{2}{3}$ rd portion of the consideration for which no legal necessity is proved, and of the plaintiff's $\frac{1}{3}$ rd share in lieu of the remaining $\frac{1}{3}$ rd of the consideration for which legal necessity and personal benefit to the plaintiff is proved, and that the plaintiff's suit for joint possession of the $\frac{1}{3}$ rd share should in this view of the case be dismissed as not maintainable.

On behalf of the plaintiff-respondent reliance is placed on *Bhojraj v. Nathuram* (1), cited by the lower appellate Court, and it is contended that, if the purchasers want to stand by the sale, they must be satisfied with the $\frac{2}{3}$ rd share of Dipchand and Kisansing for the entire price; that they cannot have any charge for payment of Rs. 1,200-15-3 or any portion thereof on plaintiff's $\frac{1}{3}$ rd share so as to make its payment a condition precedent to the plaintiff's getting a decree for joint possession of his $\frac{1}{3}$ rd share, and, further, that the valid and invalid portions cannot be apportioned in the manner suggested by the appellants; but that, if there is to be any apportionment at all, it must be of the valid as well as the invalid portion of the consideration, in proportion to the share of each coparcener. I think that the last contention of the plaintiff-respondent's counsel is sound and must prevail. The view taken by Mittra, A. J. C., in *Bhojraj v. Nathuram* (1) was based on a case reported in *Marappa Gaundan v. Rangasami Gaundan* (2).

But with due respect to the learned Judges who decided the Madras case, I must say that that decision had ceased to be good authority ever since it was dissented from in 1912 by two Hindu Judges of the same High Court in *Vadivelam v. Natesam* (3). I daresay that Mittra, A. J. C., would not have decided *Bhojraj v. Nathuram* (1) on the authority of a ruling which was already dissented from four years back had that fact been brought to his notice. An argument similar to the one advanced on behalf of the appellants in the present case was pressed before the Judges who decided the

(1) [1916] 12 N. L. R. 161=37 I. C. 498.

(2) [1950] 23 Mad. 89.

(3) [1912] 37 Mad. 435=23 M. L. J. 256=16 I. C. 835=(1912) M. W. N. 851.

case of *Vadivelam v. Natesam* (3) on the authority of the aforesaid earlier case, but the learned Judges declined to accept it as unsupported by any legal principles. They observed that:

According to accepted equitable principles, in the absence of anything appearing to the contrary, the consideration for the sale must be distributed over the whole of the property sold in proportion to the value of each part.

This view has since been accepted in this Court in *Bhadaji v. Ganeshrao* (4). Following this principle, the whole of the consideration of Rs 3,550 of the sale in question must be distributed over the shares belonging to the plaintiff and his brothers Dipchand and Kisansing. As observed in the later Madras case, which is exactly on all fours with the present, there is no ground for supposing that one portion of the consideration was allocated to a particular share and the other portion to the other share or shares; the valid portion of the consideration, as well as the invalid portion, must be distributed over the shares of the three brothers equally. The consequence of this apportionment is that the plaintiff's $\frac{1}{3}$ rd share must be treated as charged to the extent of $\frac{1}{3}$ rd of the valid portion of the consideration which comes to Rs. 400-5-1 only. The lower appellate Court was thus clearly wrong in decreeing joint possession of $\frac{1}{3}$ rd share to plaintiff without payment. The decree passed in the case will, therefore, be modified by inserting a direction therein for payment of the amount of Rs. 400-5-1 as a condition precedent to the recovery of joint possession of the $\frac{1}{3}$ rd share by plaintiff-respondent 1 from the defendants.

The next point which calls for decision is whether the lower appellate Court was right in passing a decree for mesne profits from the date of the suit. Following the view laid down by their Lordships of the Privy Council in *Banwari Lal v. Mahesh* (5). I hold that since the sale-deed in question has not been unconditionally set aside, but the plaintiff is held to be entitled to get it set aside on payment of his quota of the valid portion of the consideration, the defendants-appellants must necessarily be deemed to be lawfully in possession until the sale is set aside and they are, therefore, not accountable for mesne profits. I therefore modify

the direction for payment of mesne profits by ordering defendants to pay mesne profits from the day the plaintiff deposits the amount of Rs 400-5-1 into Court and gives notice thereof to them instead of from the date of suit as was done in *I. L. R. 57 Mad. 435*.

The appeal is allowed with costs and the decree of the lower appellate Court is modified as stated above.

G.B.

Appeal allowed.

A. I. R. 1927 Nagpur 381

FINDLAY, J. C.

Ganpat and others — Defendants—Appellants.

v.

Bhanudas—Plaintiff—Respondent.

Second Appeal No. 250 of 1926, Decided on 29th June 1927, from decree of Dist. Judge, Nagpur, D/- 29th March 1926, in Civil Appeal No. 255 of 1925.

C. P. Tenancy Act (1920), S. 5—Under S. 41, *Tenancy Act* (1898), survivorship was not applicable so there was no vested right by birth.

The law of survivorship was not applicable to absolute occupancy land under the *Tenancy Act* of 1898; a person could, therefore, get no vested right by birth in the absolute occupancy land before the introduction of the *Tenancy Act*, 1920: 4 N. L. R. 9; 5 N. L. R. 103 and A. I. R. 1926 Nag. 433, *Foll.*

A. V. Chorghade—for Appellants.

C. B. Parakh and S. R. Mangrulkar—for Respondent.

Judgment. — There are only three points for decision in this second appeal. The facts of the case are sufficiently clear from the lower Courts' judgments. The first matter for decision is whether the finding of the learned District Judge in para. 5 of his judgment is correct or not. It has been urged before me, on the strength of the decisions reported in *Ghanya v. Uhand Rao* (1) and *Tek Chand v. Tulai* (2), cf. also *Mulchand v. Chandra Singh* (3), that the law of survivorship not being applicable to absolute occupancy land under the *Tenancy Act* of 1898, the plaintiff had no vested right by birth in the absolute occupancy land. Ragho died in 1918 and it is suggested that it is to this year one must look as to the law being applicable. The learned District Judge did not deal with this

(4) A. I. R. 1924 Nag. 103=30 N. L. R. 4.

(5) A. I. R. 1913 P. C. 118=41 All. 63=45 I. A. 284=21 O. C. 22 (P. C.).

(1) [1908] 4 N. L. R. 9.

(2) [1901] 5 N. L. R. 103=3 I. C. 52.

(3) A. I. R. 1926 Nag. 433.

matter in detail, but held that the introduction of "survivorship" into S. 5, Tenancy Act, 1920, altered the position and that, therefore, an absolute occupancy tenancy stands on no different footing from that of any other joint family property. In view of the fact that Ragho died in 1918, it seems to me that the District Judge erred in coming to the conclusion he did. So long as defendant 1 is alive, the question who will inherit the tenancy rights in these occupancy fields does not seem to me to arise, for it is to the year 1918 we must look for the legal incidents applicable to the occupancy land in suit. I am of opinion, therefore, that the plaintiff-respondent is not entitled to claim partition of the absolute occupancy fields in question, and in this connexion I am of opinion that the decision of the Judge of the first Court, contained in para. 18 of his judgment, is correct.

The second matter for decision is whether the District Judge exercised a correct discretion in awarding a decree for partition. It has been urged in this connexion that the defendants only denied the plaintiff's right to partition as regards certain items of the property and that their attitude has not really been antagonistic to his right. On the whole, I do not think I will be justified in disturbing the discretion which the lower appellate Court has deliberately exercised in this connexion, and I see no reason for interference so far as the rest of the decree for partition is concerned.

Lastly, it has been urged that, as the plaintiff came to Court with an inflated claim, the learned District Judge was incorrect in saddling the appellants with his costs. As the result of this judgment implies that the plaintiff has failed in a large portion of his claim, the most suitable order of costs would appear to be that the defendants should bear one-third of the plaintiff's costs in the first Court, while other costs in the first Court and in appeal will be borne by parties incurring them.

A decree will accordingly be drawn up in supersession of that passed by the lower appellate Court and in it the absolute occupancy lands will be excluded from partition, the plaintiff's claim being dismissed as regards them.

R.K.

*Decree varied.***A. I. R. 1927 Nagpur 382**

KINKHEDE, A. J. C.

Mt. Mainabai—Plaintiff—Appellant.

v.

Yadao and others—Defendants—Respondents.

Second Appeal No. 190-B of 1926, Decided on 20th March 1927, from decree of Dist. Judge, Akola, D/- 15th February 1926, in Civil Appeal No. 55 of 1925.

Evidence Act, S. 101—*Onus is immaterial in appeal when all evidence is given.*

When all the evidence is in, the question of burden of proof has little or no importance at the stage of appeal. [P 383 C 1]

D. T. Mangalmurti—for Appellant.*A. S. Athalay*—for Respondents.

Judgment.—This is an appeal by the plaintiff, who lost her suit in both the Courts below. One Ramchandra Balaji was the father of the plaintiff-appellant. He died on 20th March 1912. The property in suit was owned by him. He adopted plaintiff's son, Balkrishna, who is defendant 3 in the case, but the adoption was invalid on the ground that he was the daughter's son. Prior to the adoption he executed a will dated 27th January 1910 in favour of his wife and defendants 1 and 3 and a registered deed of gift dated 8th February 1911 in favour of defendants 1 and 3, the wife having been then dead. Plaintiff claimed to succeed to the estate, in spite of the afore-said gift and the will, by virtue of her right of inheritance as the daughter. The plaintiff thus denied the alleged will and the gift and disputed the validity thereof on several grounds. Amongst other pleas the plaintiff contended that Ramchandra was not of a sound disposing mind at the date of the gift, and that undue pressure was brought to bear upon him by defendant 1 who was in a position of active confidence towards Ramchandra so as to dominate his will.

The Court of first instance held in favour of the validity of the gift and dismissed the suit on the additional ground that the claim for possession was barred as a claim to set aside the deed of gift was barred by limitation. The lower appellate Court held that the deed of gift was duly executed and attested and accompanied by delivery of possession, and that no undue pressure or influence was exercised upon Ramchandra by defendant 1 in connexion with the deed of

gift, and that Ramchandra executed it voluntarily and with full knowledge of its contents. It also held that plaintiff's claim to set aside the deed being barred the suit for possession was also barred. Plaintiff has, therefore, come up in second appeal contesting all the findings, and also urging that the frame of issue 6 was wrong, inasmuch as it threw the onus of proof on the plaintiff rather than on the defendants, and also complaining that some of the documents were improperly rejected.

It must be borne in mind that, when all the evidence is in, the question of burden of proof has little or no importance at the stage of appeal. I see no justification for upsetting the concurrent findings of fact arrived at by the Courts below on the question of the factum and validity of the gift dated 8th February 1911. The gift being thus operative during Ramchandra's own lifetime, there was nothing on which the will could operate at Ramchandra's death, much less was there any scope for plaintiff to come in as an heir by inheritance to her father. In this view of the case no question of setting aside the gift-deed, as a condition precedent to the recovery of possession of the property transferred thereby, at all arises for consideration. The gift being valid and operative, there was nothing for either the donor Ramchandra or his daughter, the plaintiff, to avoid by suit. The finding as to limitation would be necessary only in the event of the Court holding that the gift was made under circumstances which entitled the donor or his heir to avoid it. In the absence of such a finding, and in the face of a positive finding to the effect that the gift is valid and complete in every respect, there was no necessity to come to any decision on the question of limitation.

The question of exclusion of some documentary evidence was not seriously pressed. The appeal, therefore, fails and is dismissed with costs.

R.K.

*Appeal dismissed.***A. I. R. 1927 Nagpur 383**

KINKHEDE, A. J. C.

Atmaram and another—Defendants 1 and 2—Appellants.

v.

Umedsingh and others — Plaintiffs—Respondents.

Second Appeal No. 192-B of 1926, Decided on 28th March 1927, from decree of Addl. Dist. Judge, Amraoti, D/- 30th January 1926, in Civil Appeal No. 312 of 1925.

Hindu Law—Alienation by widow—Alienation old, but the deed containing no recital as to necessity—Presumption as to its existence does not arise.

The principle that when a sale by a Hindu widow is old enough, a presumption ought to be made in favour of the transaction being supported by legal necessity does not apply where the sale-deed contains no recital as regards the existence of any legal necessity for the transaction: *A. I. R. 1916 P. C. 110, Applied.*

[P 384 C 1]

P. C. Dutt—for Appellants.

B. K. Bose and V. Bose—for Respondents.

Judgment. — One Gangaram Singh was the owner of the field in dispute. At his death, which took place 35 years ago, he left behind a widow by name Kapuri and a daughter by name Kesarbai. Kapuri thus inherited her husband's estate and was in possession of the field in suit until she sold the same to one Rupram by a deed dated 8th April 1898 (Ex. D-2). She died on 8th September 1921. Kesarbai and her son Atmaramsingh, with a view to raise funds for this litigation, sold their interests to plaintiff 1, Umedsingh, by a sale-deed dated 25th June 1924 (Ex. P-1). The vendors and the vendee, however, instituted the present suit jointly on the ground that the sale was inoperative after Mt. Kapuri's death. It may be mentioned here that the original purchaser, Rupram, by a subsequent transaction, dated 5th February 1906, sold his interest to defendant 1; the latter resisted the claim on various grounds, principal amongst them being that the sale to Rupram was supported by legal necessity.

The trial Court came to the conclusion that the sale to Rupram was not for legal necessity and decreed the plaintiff's claim. The defendants' appeal to the Court of the Additional District Judge being unsuccessful, they have come up in second appeal to this Court.

I have heard the arguments of the appellants' learned counsel, but I am not convinced that the decision appealed against is in any way incorrect. It was the duty of the appellants to have proved that the transaction with Rupram was supported by legal necessity. But they have failed to do so. The Courts below found that Kapuri's borrowings were extravagant, and that there were no debts of her husband's time, and consequently the sale could transfer to Rupram or his vendee only the life-interest of Kapuri. It is, however, argued that the sale having taken place nearly 25 years before suit, and much of the relevant evidence having disappeared by lapse of time, the presumption ought to have been made in favour of the transaction being supported by legal necessity, and that the presumption has gained additional strength by reason of plaintiffs' omission to sue for setting aside the alienation during the lifetime of Mt. Kapuri. The argument advanced is only plausible, but not sound. Neither the sale-deed nor the two previous mortgages in favour of Rupram contain a single word or recital as regards the existence of any legal necessity for the transaction. The recitals, if there had been any, would have served as a good piece of evidence of the borrower's or vendor's representation as to the existence of legal necessity and in view of the lapse of time could have served to discharge the onus of proof that lay on the alienee as was observed by their Lordships of the Privy Council in *Banga Chandra Dhur v. Jagat Kishore* (1). In the absence of such recitals I am not prepared to extend the principle of the Privy Council decision to the facts of the present case.

The appeal, therefore, fails and is dismissed with costs.

D.D.

Appeal dismissed.

(1) A. I. R. 1915 P. C. 110 = 14 Cal. 156 = 13 I. A. 249 (P. C.).

A. I. R. 1927 Nagpur 384

PRIDEAUX, A. J. C.

Jairam Singh—Applicant.

v.

Emperor—Non-applicant.

Misc. Petn. No. 81 of 1926, Decided on 26th November 1926, for transfer of the case from the file of 1st Class Magistrate, Wardha.

Criminal P. C., S. 526—Question is whether applicant believes that justice would not be had and not whether the belief is reasonable.

In order to decide the advisability of transfer, the question is not whether the belief that the applicant would not get justice is reasonable or unreasonable, but whether it exists or not, though the only way of deciding whether it exists or not is to see whether it might reasonably be expected to exist in a person of the standard of intelligence and honesty common in the class to which the accused belongs: *A. I. R. 19 6 Nag. 448, Foll.* [P 385 C 1]

M. R. Bobde—for Applicant.

G. P. Dick—for the Crown.

Order.—There is a case (No. 27 of 1926) pending in the Court of Mr. Laxminarayan, 1st Class Magistrate, Wardha. It is a case under S. 145, Criminal P. C. There is a dispute as regards the property left by one Parbati Bai between the applicant *Jairam Singh* and one *Narayan Singh*. *Narayan Singh's* case is that his son *Parashram Singh* was adopted by the deceased, while *Jairam Singh* claims he is a reversioner. The evidence for *Jairam Singh* has all been taken and the Court is now taking evidence of *Parashram Singh*. On 19th October last *Jairam Singh* applied to the District Magistrate for a transfer of the case and he, in his application, made certain definite allegations against the Magistrate; allegations which led him to suspect of fear that the Magistrate was against him. These allegations were:

(1) That Mr. Laxminarayan sent for the applicant at his bungalow about a month ago and he advised him to give about four annas share to *Narainsingh*. The applicant declined to accede to this suggestion.

(2) That *Lachiramsingh*, *Malguzar* father of *Narainsingh*, is a special friend of Mr. Laxminarayan, and he must have told all about the case to the Court. The applicant apprehends and has strong reason to believe that justice will not be done in the Court of Mr. Laxminarayan as it is impossible for the Court to dissociate himself with the knowledge or information about the case.

(3) That after the institution of this case the applicant had personally twice seen *Narainsingh* in the bungalow of Mr. Laxminarayan and it is likely *Narainsingh* also has prejudiced the Court against the applicant.

(4) That, on 15th October 1925, *Narainsingh* informed the applicant that they both should go to the Court at his house and a compromise would be effected. *Narainsingh* further said *Court to hamara hai*.

Now one would expect the Magistrate to categorically deny the allegations made or to explain exactly what has happened. But Mr. Laxminarayan's answer can only be termed evasive. It runs:

(1) I have not the least objection if the case is transferred from my file.

(2) I am not in any way prejudiced against the applicant and would be the last man for such a prejudice against anybody.

(3) Being an outsider and stranger to this place I have no friendship with anybody in the Wardha District.

(4) Of course in the capacity of Sub-Divisional Officer and an Executive Officer, when necessity arises, I do see people.

This is clearly no answer to the allegations made, and I can only infer that, as they have not been denied, the allegations are correct. It may well be that Mr. Laxminarayan is rightly endeavouring to effect a compromise between the parties, but such matters should take place openly in Court and not at the Magistrate's bungalow. Though I am not prepared to hold that Mr. Laxminarayan is in any way prejudiced in the matter or would not dispose of the case justly, yet it seems to me that the applicant has some grounds for his apprehensions. As pointed out by my brother Hallifax, A. J. C., in *Sheikh Abdulla v. Emperor* (1),

The question is not whether the belief is reasonable or unreasonable, but whether it exists or not, though the only way of deciding whether it exists or not is to see whether it might reasonably be expected to exist in a person of the standard of intelligence and honesty common in the class to which the accused belongs.

I think this case should be transferred, and I transfer it to such other competent Court as the District Magistrate may elect. The applicant agrees that no trial de novo will be ordered. His case is closed, and the new Magistrate will proceed with the case from the stage at which it now stands, the applicant Jairamsingh not being allowed to call further parol evidence.

D.D. *Transfer ordered.*

(1) A. I. R. 1926 Nag. 448=22 N. L. R. 99.

A. I. R. 1927 Nagpur 385

HALLIFAX, A. J. C.

Jagdeorao—Plaintiff—Appellant.

v.

Mahadeo and another—Defendants—Respondents.

Second Appeal No. 180 of 1926, Decided on 11th February 1927, from decree of Addl. Dist. Judge, Wardha, D/-16th December 1925, in Civil Appeal No. 105 of 1925.

Wajib-ul-arz—Construction.

The plaintiff was the owner of a patti in the village of Nimgaon, which included plot 152.

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This plot had never been cultivated, and the *wajib-ul-arz* recorded that the inhabitants had a right to stand their cattle there and the owners had no right to cultivate it or get it cultivated without setting apart another plot of equal area for the same purpose. The defendants claimed a quarter share in the dung found on the plot. The plaintiff accordingly claimed a declaration that the defendants were not entitled to any such share. The *wajib-ul-arz* provided further that: "Cattle dung found in compounds or precincts belonged to the owners of such compounds or precincts."

Held: that, the dung on plot 152 belonged to plaintiff. [P 386 C 1]

S. B. Gokhale, D. P. Agashe and D. N. Khare—for Appellant.

M. R. Bobde—for Respondents.

Judgment.—The plaintiff-appellant is the owner of a patti in the village of Nimgaon, and plot 152 in that village is included in that patti and belongs to him. This plot has never been cultivated; it adjoins the *abadi*, and the *wajib-ul-arz* records that the inhabitants have a right to stand their cattle there and the owners have no right to cultivate it or get it cultivated without setting apart another plot of equal area for the same purpose. The defendants own another patti in the same village, and they have been asserting, and still assert, a right, as owners of a quarter share in the whole village, to collect and appropriate a quarter share of the droppings of the cattle from plot 152. The plaintiff accordingly claimed a declaration that they were not entitled to any such share.

In the first Court it was held that each cosharer in the village was entitled to a share in the manure, the decision resting mainly on a statement made in 1908 by the plaintiff's father Balaji in a suit between cosharers in the defendants' patti. In appeal it was held that, according to the *wajib-ul-arz* the, "manure is not the exclusive property of the landlords" and "anyone can remove the manure of the gothan." The decree of the lower Court dismissing the claim for a declaration and injunction was accordingly maintained.

It is true that Cl. 13 of the *wajib-ul-arz* says that "cattle dung...found on...waste land may be appropriated by any resident of the village" (which is not quite anyone in the world, as seems to have been held in the lower appellate Court) and that plot 152 is, and always has been recorded as waste land. But that general right is not the right as-

serted by the defendants, nor are they likely to assert it. Indeed they have denied it all through by asserting the exclusive right of the owners of the village, which includes their own right to a definite share in the manure.

But the concluding words of the same clause of the wajib-ul-arz show that even that general right does not exist. They are :

Cattle-dung found in compounds or precincts belongs to the owners of such compounds or precincts.

That undoubtedly refers to the gothan or akhar and the plaintiff is the sole owner of cattle-dung found there.

It may be mentioned that the whole of the evidence given in regard to the previous suits between the defendants and Bana Bai, who owned a one-third share in their patti, is, with one exception, irrelevant. The exception is the statement in one of those suits made by the plaintiff's father Balaji (to whom the judgment of the lower appellate Court gives the name of the defendants' father Anyaji), and that proves nothing.

The decree of the lower appellate Court will be set aside, and in its place a decree will issue containing the declaration and injunction for which the plaintiff prayed. The defendants must pay the whole of his costs in all three Courts. The pleader's fee in this Court will be thirty rupees.

D.D.

Decree set aside.

A. I. R. 1927 Nagpur 386 (1)

KOTVAL, A. J. C.

Tulsiram—Appellant.

v.

Ganpat—Respondent.

Second Appeal No. 399-B of 1925, Decided on 16th July 1927, from decree of 2nd Addl. Dist. Judge, Amraoti, D/- 18th September 1925, in Civil Appeal No. 59 of 1925.

Easements Act, S. 15—User as owner cannot be made basis of easement.

The user over a land purported to be exercised as owner cannot be made the basis of an easement. [P 386 C 2]

G. R. Deo—for Appellant.

M. R. Bobde—for Respondent.

Judgment.—It is first argued that the sale-deed, Ex. P. 1, is not properly interpreted by the lower appellate Court

as regards the description of the length. There is no misinterpretation. The Court has understood it in the very sense that the learned pleader for the appellant has attached to it in argument, viz., that 25 cubits represent the length of the structure only and not also of the open site. The other recitals in the deed show that some open site to the east was included in the sale. Exhibit P 4 further supports the plaintiff's claim. The wall referred to therein is clearly the wall XY or AD and not the wall BC.

The finding that the site ABCD belongs to the plaintiff is not open to interference in second appeal, and that finding stands. The projection of the eaves is admittedly a trespass. The projection has apparently been deliberate and no reason can be seen why the trespass should be allowed to continue on condition of the defendant paying compensation to the plaintiff. No plea to this effect was made in the lower Courts.

The user over the site having been purported to be exercised as owner cannot be made the basis of an easement.

As regards the order directing the door in the wall XY be removed, the decree of the first Court, which has been confirmed in appeal, cannot be supported. The wall and its site are the property of the defendant and he is at liberty to deal with the wall as he likes. The plaintiff cannot claim that he should not open a door in it. The decree will be amended by the omission of the words "and the door" occurring between the words "remove the eaves" and the words "in dispute immediately."

As the appeal has failed substantially, the appellant will pay the costs of the respondent.

N.K.

Decree modified.

A. I. R. 1927 Nagpur 386 (2)

HALLIFAX, A. J. C.

Lalu Dhimar—Defendant—Appellant.

v.

Suddani Bai—Plaintiff—Respondent.

Second Appeal No. 269 of 1926, Decided on 30th March 1927, from decree of Addl. Dist. Judge, Raipur, D/- 1st April 1926, in Civil Appeal No. 226 of 1925.

Benami—Lease in favour of concubine—Cultivation by lessor—Concubine permanent and living with lessor—Presumption is that the cultivation was for her.

Where a person executes a deed of lease in favour of his permanent concubine, living with him, and gets her name transferred in the jamabandi, but carries on the cultivation himself, the only possible presumption from that fact was that he carried on the cultivation for her : *A. I. R. 1927 P. C. 22, Foll.*

[P. 387 C 1]

Abdul Razak—for Appellant.

S. C. Dutt Choudhry—for Respondent.

Judgment.—The learned Judge of the lower appellate Court has discussed at some length the plea that the consent of the sole proprietor of a village to a transfer of an occupancy holding by a tenant to another person is a dealing with the property in the village such as is mentioned in S. 52, T. P. Act. The finding seems to be that the consent was an express waiver of the right to get it set aside and was therefore a dealing with the property of the kind prohibited by S. 52. That is obviously incorrect, but as the learned Judge himself says at the end of his discussion, the matter is irrelevant and the question does not arise in the case.

The plaintiff's case was certainly meant to be based on S. 52, T. P. Act, as otherwise there was no necessity of mentioning that the suit against Rai Bahadur Singh had been instituted before the acquisition of occupancy rights by the defendant, whether from Deobati or Deoki Bai or from Rai Bahadur Singh. It was, however, actually based on S. 53 of that Act, but, even on the finding that Deoki Bai never was in fact a tenant of the land and the ostensible transfer by her with the consent of Rai Bahadur Singh was in reality a lease by the latter to the defendant Lalu Dhimar, the transaction could not be avoided unless it appeared that the defendant was a party to the fraud.

The finding that Deoki Bai never was in fact a tenant of the land rests almost entirely on the fact that Rai Bahadur Singh carried on the cultivation of it. The only possible presumption from that fact, when the execution and registration of the deed of lease and the entry of Deoki Bai's name in the jamabandi for each year thereafter had been proved, was that he carried on the cultivation for her, as she is his permanent concubine and lives with him in the village in

which the land is situated. A similar presumption was described by their Lordships of the Privy Council in *Ma Mi v Kallander Ammal* (1), as "natural" in circumstances that supported it even less strongly than those of the present case.

Practically the whole of the rest of the evidence points to the conclusion that Rai Bahadur Singh did in fact create Deoki Bai a tenant of the 81.92 acres of waste land in 1921. But the finding that he did not will not support the decree. If the lease of 1921 was a mere pretence between Rai Bahadur Singh and Deoki Bai, Lalu Dhimar, who took a transfer of 22.40 acres of it in 1922 and 1923, certainly had every reason to believe that it was a real lease. There was a registered deed of lease and Deoki Bai was in possession, and further Rai Bahadur Singh consented to the transfer, that is to say, confirmed the genuineness of the lease. The suggestion that the ostensible granting of the lease of 82 acres of waste land to Deoki Bai in 1921 was a scheme to facilitate the grant of 22 acres of it to Lalu Dhimar in the following year is fantastically improbable, and anyhow it is quite impossible that Lalu should have known anything about it. His rights are therefore saved by the last clause of S. 53, T. P. Act.

It is by no means clear that the learned Judge of the first Court was right in refusing to order that Rai Bahadur Singh and Deoki Bai should be made parties to this suit. Further it is nowhere stated that the plaintiff has made any attempt to avoid the lease to Deoki Bai of the remaining 59.48 acres of land. If she has allowed that to stand, the fact is strong evidence of the genuineness of the whole lease. But these matters need not be discussed, as the suit must be dismissed anyhow. The decree of the lower appellate Court will accordingly be set aside and a decree will issue dismissing the suit and ordering the plaintiff to pay the whole of the costs of both parties in all three Courts. The pleader's fee in this Court will be fifty rupees.

R.K.

Decree set aside.

(1) *A. I. R. 1927 P. C. 22=5 Rang. 7=54 I. A. 23 (P. C.).*

A. I. R. 1927 Nagpur 388

FINDLAY, J. C.

Mt. Yashoda—Accused—Applicant.
v.*Mt. Banubai* — Complainant — Non-applicant.

Criminal Revn. Appln. No. 447 of 1926, Decided on 9th December 1926, from order of Dist. Magistrate, Nagpur, D/-27th September 1926, in Criminal Case No. 16 of 1926.

Criminal P. C., S. 403—"Trial" is not necessarily a decision on merits—"Trial" commences when accused appears in pursuance of summons—Acquittal under S. 247 bars further complaint—*Criminal P. C., S. 247*.

The word "tried" in S. 403 does not necessarily import a decision of any case on the merits. A trial commences, if not from the moment an accused is served with summons, certainly from the moment he appears in Court on the case being called. An acquittal under S. 247 is a bar to further prosecution: *A. I. R. 1923 All. 360*; *4 C. W. N. 346*; *34 Mad. 253* and *40 Mad. 976, Foll.* [P 388 C 2]

V. N. Harlekar—for Applicant.

A. N. Chorghade—for Non-applicant.

Order.—The applicant, *Mt. Yashoda*, in this case, was prosecuted by the non-applicant, *Mt. Banubai*, in the Court of the Third Class Honorary Magistrate Nagpur, for an offence under S. 352, I. P. C. One *Mt. Jai* was also included as an accused in the same complaint. On 12th June 1926, the date fixed for hearing, the applicant was present and served, while the other accused was absent and unserved. As the complainant was absent, however, the accused was acquitted under S. 247, Criminal P. C. In this connexion I may say that the order of the Magistrate is a vague one and it is not clear from its terms whether *Mt. Jai* was also acquitted. That is immaterial, however, so far as the present application is concerned.

Subsequently, the non-applicant, complainant, filed a fresh complaint on the same facts against the same accused and in the same Court. The applicant applied to the Court on the ground that having been once acquitted, she could not be tried again on the same facts, but the Magistrate declined to entertain this proposition. A criminal revision was then filed before the District Magistrate; the latter held that it was not clear whether the accused were both in Court on the day they were acquitted, and it was doubtful whether the trial had really begun.

The District Magistrate, therefore, saw no cause to interfere and allowed the trial to proceed.

On behalf of the applicant it has been urged that S. 403, Criminal P. C., offers an absolute bar to her fresh trial for the alleged offence under S. 352, I. P. C.: cf. *Emperor v. Dulla* (1), *Panchu Singh v. Unnor Mahomed Sheikh* (2); *In the matter of Cuggilapu Paddaya* (3) and *In re Dudekula Lal Sahib* (4), which have been relied on in this connexion by applicant. On behalf of the non-applicant, reliance has been placed on the remarks of Napier, J., in the last-quoted case, but it is pertinent to point out that when the case was referred to Wallis, C. J., the latter examined the point at issue from the historical point of view, and came to the conclusion that an acquittal under S. 247, Criminal P. C., was intended to operate as a final bar to further proceedings.

In my opinion the present case gives rise to no difficulty with reference to the word "tried" in S. 403, Criminal P. C. The present applicant had been duly served and she apparently appeared before the Court. The trial began as soon as she so appeared and, in my opinion, therefore, the further complaint against her for the same offence on the same set of facts was ultra vires of S. 403. The great weight of authority is in favour of the view I take and I am not prepared to admit that the word "tried" in S. 403 necessarily imports any decision of the case on the merits. The trial had, in reality, commenced, if not from the moment the applicant was served with summons, certainly from the moment she appeared in Court on the case being called. Had it been intended to omit an acquittal under S. 247 from the scope of S. 403, I should certainly have expected to find mention of the fact in the explanation to the latter section. So far as the present applicant is concerned, therefore she cannot, in my opinion, be prosecuted again for the same offence.

As regards *Mt. Jai*: I am not prepared to pass any orders at present. The full facts regarding her non-appearance or otherwise are not before me. It will

(1) *A. I. R. 1923 All. 360*=*45 All. 58*.

(2) [1899] *4 C. W. N. 346*.

(3) [1911] *34 Mad. 253*=*9 I. C. 253*=*9 M. L. T. 93*.

(4) [1917] *40 Mad. 976*=*13 M. L. J. 121*=*45 I. C. 261*=*3 M. L. W. 175*.

suffice, therefore, to order that the proceedings pending in the Court of Mr. Aminuddin, Third Class Honorary Magistrate, Nagpur, in Criminal Case No. 10 of 1926 are quashed so far as the present applicant, Mt. Yashoda, is concerned.

J.V.

Application allowed.

A. I. R. 1927 Nagpur 389

FINDLAY, J. C.

Madhorao and others—Defendants—Applicants.

v.

Govind Raghoba Totade—Plaintiff—Non-applicant.

Civil Revn. No. 438 of 1926, Decided on 6th April 1927, from judgment of Dist. Judge, Nagpur, D/- 19th October 1926, in Civil Appeal No. 70 of 1926.

Civil P. C., S. 115—Wrong decision on point of limitation—No revision lies (obiter).

An erroneous decision of the lower Court on the question of limitation is not a sufficient ground for interference in revision: 4 N. L. R. 184; 11 N. L. R. 99 and 13 N. L. R. 116, *Foll.* [P 389 C 2]

A. V. Khare—for Applicants.

M. R. Bobde and M. D. Khandekar—for Non-applicant.

Order.—In the present revision application an objection was raised on behalf of the plaintiff-non-applicant (*Govind Raghoba Totade*) that no revision application could lie. It was urged in this connexion that the suit was of a Small Cause Court nature for an amount under Rs. 500, and that under S. 102, Civil P. C., no second appeal lay. Over and beyond this, it was urged that none of the conditions laid down in S. 115, Civil P. C. were fulfilled in the present case.

One of the main contentions urged on behalf of the applicants was that the decision of the learned Dist. Judge on the question of limitation was wrong and that limitation should, at the best, for the plaintiff, have been held to run from 1916, when he stood surety, or from 1917, when the payment of Rs. 100 was made to Bansilal.

As at present advised, I see no reason to differ from the finding of the learned Dist. Judge, that the cause of action, in reality, arose from 17th August 1922, when the plaintiff paid Kuhikar for the price of the *gof*. Even, however, had I seen cause to differ from the decision of

the Dist. Judge on the question of limitation, it seems to me that this would not be a sufficient ground for interference on revision: cf. *Duri v. Mohanlal* (1), *Manya v. Diwakar* (2) and *Ganesh Prasad v. Mt. Rewa Bai* (3).

The other grounds urged in the petition of revision would afford even less ground for interference and, none of them, in my opinion, amount to a wrong exercise of jurisdiction, a failure to exercise proper jurisdiction, or to illegal or materially irregular action on the part of the lower Courts. The main question involved is whether the plaintiff substituted himself for the defendants as the debtor of Bansilal Abirchand or was a mere surety. This was a pure finding of fact on which the lower appellate Court was perfectly entitled to come to the decision it has. It has been suggested in this connexion that the Dist. Judge misread and misunderstood the letter (D. 2), but I am unable to accept this contention. It would doubtless have been well if the books of Bansilal Abirchand had been called for, but for the failure to do this, the present applicants seem peculiarly responsible. When it was discovered that Nandkishore (P. W. 2) was no longer in the service of Bansilal Abirchand, the Court should have been moved to arrange for the production of the books of the firm in question. Not only so, but the absence of these books and the necessity of having them produced were not even made a ground of appeal in the lower appellate Court. I have merely mentioned these matters in order to make it clear that the present application for revision on the merits had little or no chance of success, but I find it unnecessary to enter into the contentions of the applicants in further detail, for the simple reason that, in my opinion, on any of the contentions put forward, the present application does not lie under S. 115, Civil P. C.

The application is accordingly dismissed. The applicants must bear the non-applicant's costs. Costs in the lower Courts as already ordered.

D.D.

Application dismissed.

(1) [1908] 4 N. L. R. 184.

(2) [1915] 11 N. L. R. 99=29 I. C. 740.

(3) [1917] 13 N. L. R. 116=41 I. C. 883.

A. I. R. 1927 Nagpur 390

KINKHEDE, A. J. C.

Govind Jageshwar—Plaintiff—Appellant.

v.

Kashirao and others—Defendants—Respondents.

Second Appeals Nos. 174-B and 186-B of 1926, Decided on 28th March 1927, from decision of Dist. Judge, East Berar, Amraoti, D/- 6th February 1926, in Civil Appeal No. 121 of 1925.

Cosharers—One alone can sue trespasser in ejectment.

One of several co-owners can maintain an action in ejectment against a trespasser without joining the other co-owners as parties to the action: 39 *Mad.* 501, *Foll.* [P 391 C 2]

R. R. Jaywant and *V. R. Dhoke*—for Appellant.

P. C. Dutt and *M. R. Pathak*—for Respondents.

Judgment.—This judgment will also dispose of Second Appeal No. 186-B of 1926. One Goma mortgaged his two fields, Nos. 25 and 15/2, to one Jageshwar in 1906. Jageshwar filed Suit No. 153 of 1913, but he died before obtaining a final decree for foreclosure. He left behind him the present plaintiff, Govind, whom he had adopted as a son to himself. He was brought on record and the final decree was passed in his name on 29th September 1916, Ex. P-10. Plaintiff was then a minor and his natural father, Diwaker Nagorao, acted as his guardian and managed his affairs. Consequently for the purposes of that suit the said Diwaker Nagorao figured as Govind's next friend. Jageshwar had left a will dated 11th October 1915 (Ex. P-1) whereby he bequeathed an 8-annas share in the estate to his adopted son and the remainder was distributed by him amongst several persons of whom Diwaker Nagorao got two shares. Thus, although the final decree stood in the plaintiff's name alone, other persons were interested in the same as colegatees with him, his individual share therein being only eight annas. Diwaker Nagorao purporting to act as guardian of Govind and for self, executed two sale-deeds, one dated 29th April 1918 Ex. P-11 and the other dated 29th June 1918 Ex. P-12 in favour of Bhagwanji Thakare for Rs. 1,350 and Rs. 400 in respect of Survey Nos. 15/2 and 25 respectively. These sale-deeds recite that the considera-

tion was required to satisfy an antecedent debt due by Jageshwar to one Krishnaji Tarar's, legal representative one Lahnu. The purchaser was put in possession of the property purchased by him. The plaintiff alleging that the sales were without legal necessity, instituted the present suit on 3rd May 1924 for setting aside the alienations and recovering possession as owner thereof.

The defence was that the sales were supported by legal necessity inasmuch as property was sold to pay off debt due to one Krishnaji. Defendants also pleaded bona fide enquiry. Their further plea was that Diwaker Nagorao was appointed a guardian and manager of plaintiff's estate by the terms of Jageshwar's will and, therefore, his acts were binding on the latter. It was also pleaded that, under the terms of the will, Jageshwar had bequeathed 2-annas share in the money-lending business and fields acquired by that business after the date of the will, and that, as the fields in suit were the after acquisitions, Diwaker had 2-annas share, therein and plaintiff could not question the sale in respect of that 2-annas share belonging to Diwaker.

The Court of first instance held that the sales were not binding on the plaintiff that Diwaker had 2-annas share in the property, and that the claim was within time, and accordingly passed a decree in plaintiff's favour for joint possession of two fields to the extent of 14-annas share therein and dismissed the claim in respect of the remaining 2-annas share. The defendants appealed to the District Judge urging as many as 8 grounds of appeal and also raised an additional ground of limitation at the hearing. The plaintiff filed a cross-objection in respect of 2-annas share for which his claim was disallowed by the first Court, but withdrew that cross-objection; this meant that he accepted the disposition made by his adopted father in favour of Diwaker Nagorao. The District Judge while agreeing with the Court of first instance, that the sales were not binding on the plaintiff, and that the claim was within time, held further that, under the terms of the will, plaintiff was entitled to only 8-annas share, and that consequently he could not attack the sale in suit in respect of anything more than 8-annas share. The District Judge accordingly allowed the appeal in respect of 6-annas share on the

ground that the 6-annas share did not belong to plaintiff. Plaintiff has, therefore, filed this appeal, and the defendants have filed Second Appeal No. 186-B of 1926.

So far as the defendants' appeal is concerned I think there is absolutely no room for any interference with the decision appealed against. The Courts below have concurrently found that the sales were not for legal necessity and that there was no bona fide enquiry, and that the recital in the sale-deeds, that money was required to pay off an antecedent debt, was only a formal recital to give the transaction the appearance of legal necessity. In short, the Courts have drawn the conclusion, and I think rightly, that the sales were made under circumstances which could not constitute legal necessity so as to bind the plaintiff. The defendants' appeal, so far as it relates to 8-annas share in the fields in suit, must, therefore, stand dismissed with costs.

With regard to plaintiff's appeal relating to 6-anna share: it is conceded, as it has to be, by the defendant-respondents that there is neither pleading nor issue about the existence of any interest in that 6-annas share in favour of other persons, on the lines on which a specific plea was raised as regards the 2-annas share of Diwaker Nagorao. It is also significant to note that amongst the nine grounds of appeal taken up by the defendants in their own appeal to the District Judge, there is not a single ground contending that plaintiff could not get a decree in respect of anything in excess of his 8-annas share. Under these circumstances plaintiff-appellant contends that the lower appellate Court was not justified in taking up the ground of its own motion and, following the defendants' appeal on a point not urged by them. It is also pointed out that, if this Court were to look into evidence the appellant would be in a position to point out some material on the record which would go to show that the claims of the other legatees were satisfied, and that, therefore, plaintiff was entitled to obtain a decree to the extent to which his claim was decreed by the Court of first instance. But, in my opinion, the District Judge clearly went wrong in allowing the defendants to succeed even to the partial extent of the 6 annas share upon a point not really arising on the defence urged by them. The plaintiff,

as a co-owner or a tenant-in-common, was entitled to sue a trespasser in ejectment, even though he may not be interested in the entire property. It has been held in *Ahmed Saheb v. Magnesite Syndicate Ltd.* (1), that one of several co-owners can maintain an action in ejectment against a trespasser without joining the other co-owners as parties to the action. It was primarily the duty of the defendants to specifically raise the necessary defence to enable the Court to refuse the full relief to a plaintiff, even though he could make out a title to only 8-annas share in the property in suit. Of course if the point has been raised and put in issue and decided against the plaintiff, then only, he could have been deprived of the excess decreed in his favour, upon a proper objection being taken against a decree for such excess. If the necessary facts had been pleaded at the stage of the trial, the plaintiff would have had full opportunity of showing that, by reason of an arrangement between himself and co-legatees, he had acquired a title to the entire property in suit. I cannot, in the present state of the record, maintain the dismissal of the plaintiff's claim to the extent of 6-annas share in the property in suit.

The decree of the lower appellate Court thus needs modification in this respect. But the next question which arises for consideration is whether the defendants should be given an opportunity to plead now what they omitted to plead at the proper time. I was for a time inclined to the view that I should, give them now an opportunity to raise this new defence, and send the case down for investigation thereof. But after further consideration I have come to conclusion that the defect, if any, due to the omission to bring, the other beneficiaries under the will, either as co-plaintiffs, or co-defendants in this suit, before the Court, was not such a defect as could not be cured at all, and that, if the defendants were to be shown any concession, plaintiff was also entitled to the concession of being permitted to either, join the other beneficiaries as parties to the suit, or, allege the necessary facts which would entitle him alone to sue for the entire relief, by amending his plaint wherever necessary. Whether the plaintiff followed the first or the second course, the position of the defendants

(1) [1915] 39 Mad. 501=28 M. L. J. 598=29 I. C. 69=2 M. L. W. 460.

was not in any way improved, or likely to be bettered, for the simple reason that, as against those beneficiaries, or even plaintiff as representing their interest, the findings that Krishnaji Tarar's debt was entered in the sale-deed under circumstances which showed that it was only a nominal and formal recital, and that Diwaker did not manage the estate well, and further, that the purchaser did not make proper enquires in taking the sales nor was there any benefit derived by the estate from the sales, would still stand in the way. Treating the act of Diwaker Nagorao as an act of management in his capacity of an executor under the terms of the will there was need for proof to justify that act as a piece of prudent management. In the absence of any such proof the sales could not be supported, even as regards 6-annas share of the remaining beneficiaries. In this view of the case I see no justification for sending the case down for trial of any new defence relevant to the plaintiff's claim for 6-annas share.

The plaintiff's appeal is, therefore, allowed with costs. The decree of the lower appellate Court will be reversed and that of the first Court restored, except as to mesne profits. The plaintiff-appellant shall get his costs in all Courts from the defendants in proportion to his success in the litigation.

D.D. *Appeal 186-B dismissed.*

Appeal 174-B allowed.

A. I. R. 1927 Nagpur 392

FINDLAY, J. C.

Pandurang Sheoram — Plaintiff — Appellant.

v.

Sambhaji and others — Defendants—Respondents.

Second Appeal No. 242-B of 1925, Decided on 23rd November 1926, from decree of Addl. Dist. Judge, Yeotmal, D/- 31st March 1925, in Civil Appeal No. 56 of 1926.

Civil P.C., S. 100—Finding based on theories and assumptions is open to challenge.

Where the conclusion of the lower appellate Court was arrived at, partly on a series of theories and assumptions, and partly due to his failure to realize the evidential value of certain document, the findings of fact are open to challenge in second appeal. [P 394 C 1]

W. R. Puranik—for Appellant.

P. C. Datta, R. R. Jaywant and S. A. Ghadghay—for Respondents.

Judgment. — The plaintiff-appellant, Pandurang Sheoram, sued the three defendants-respondents, Sambhaji Irbhan and Mt. Bhagubai, in the Court of the Subordinate Judge, 2nd Class, Pusad, for ejectment of the defendants from survey Nos. 8 and 89 of mouza Kharus. His case was that these fields had stood in the name of Ramrao, son of Balaji, in the revenue records before 1875. In that year, with Ramrao's consent, the fields were conferred as a service inam in the name of the deity, Ainath Maharaj. Before that, the defendants' ancestors and, after that, the defendants had been cultivating the lands and paying assessment. The plaintiff, as the manager of the temple, sent notices to the defendants to quit the lands and, as they refused to do so, the present suit was brought.

The plaintiff's further allegation was that Punjaji, the ancestor of the defendants, was only a tenant of Ramrao, who, even after the inam was conferred, continued to let the lands out to the defendants, who, however, paid rent direct to the plaintiff. In 1914 Raoji, the son of Ramrao, began to assert his ownership of the fields, whereupon the plaintiff ignored him and let the lands orally to defendants direct.

The defendants' case was that they held the lands direct and not as tenants of Ramrao, who was a mere khatedar under the old record. They alleged that they were either anti-jagir tenants or tenants of antiquity, for they were ignorant as to how the fields had been acquired by their ancestors. They further denied that they had made any fresh contract with the plaintiff in 1914.

The Subordinate Judge, after finding that notice of ejectment had duly been served on the defendants, came to the conclusion that before the grant of the inam in 1875, the defendants' forefathers and, after them, the defendants, had been cultivating the lands. He discovered certain evidence that defendants' forefather Punjaji held a lease of the lands of five years and, therefore, held that the memory of the defendants' tenancy could not be said to be lost in antiquity. Ramrao, he held, had been the owner of the land and it was he who agreed to give them to the temple. Even thereafter, however, he

continued to hold the lands from the temple, and the defendants thus became automatically his sub-tenants. Holding that the defendants were, in those circumstances, only annual tenants, the Subordinate Judge granted a decree in favour of the plaintiff.

The defendants appealed to the Court of the Additional District Judge, Yeotmal. He differed from the Subordinate Judge, as regards the latter's finding that Ramrao and Raoji. were tenants of Ainath Maharaj, and the appellants, as well as their ancestors, were sub-tenants. For reasons, which will be discussed as far as may be necessary hereafter, the learned Additional District Judge held that the appellants were tenants of antiquity, the origin of their lease being more than 50 years old. After discussing certain documentary evidence, particularly the bhagin patraks of 1874 (Exs. P. 11 and P. 12), relevant entries, which to some extent appeared to militate against the view taken by him, the Additional District Judge came to the conclusion that the appellants, as tenants of antiquity, were not liable to ejectment and dismissed the plaintiff's suit. The latter has now come up to this Court on second appeal.

It has been strongly urged on behalf of the plaintiff-appellant that the decision of the lower appellate Court, to the effect that defendants were tenants of the lands in question, has been arrived at by a series of unwarranted conjectures and by misapprehending certain important evidence to be quite different from what in reality it was. I have been referred in this connexion to para. 3 of the judgment where the Additional District Judge holds that the position once assumed by the defendants, to the effect that Ramrao was only a khatedar and that their ancestor was the real holder and owner of the fields, was only a false plea put forward in order to secure a higher title. It is difficult to understand the grounds on which this somewhat far-fetched assumption was made. Again, in para. 4 of the judgment, it is assumed that jwari was being paid before 1875, a matter of which there was apparently no proof on record. It is pertinent also to point out, with reference to the remarks in the end of para. 4 of the judgment, that Raoji was, in Second Appeal No. 135-B of 1921 (Ex. P. 7), held to be only a tenant of the lands, and I am further unable to understand the

evidence on which the Additional District Judge has held that Raoji was an unnecessary intermeddler, who for years had been misappropriating the jwari payments.

A still more important matter relates to the entries in the bhagin patraks (Exs. P. 11 and P. 12). These entries were directly against the view of the defendants' position, which appealed to the learned Additional District Judge. He has, however, regarded these entries as of little weight or importance because, in his view, they were not authorized by any rules in force at the time being. He has, in this connexion, assumed that, as the Code of Non-Judicial Book Circulars in force in the Hyderabad Assigned Districts was only published in 1877, the register was not prepared under these rules. Here there would seem to have been a real misapprehension of the actual position as regards the authority behind the entries in Exs. P. 11 and P. 12. If we turn to the entry at the foot of p. 85, Berar Revenue Manual, Vol. 1, we find that, in Sch. 1, Berar Land Revenue Code, 1896, the Berar sub-tenancy rules were repealed, while the entry in column 1 thereof clearly shows that these rules had been in force since 1867, even although they may not have been published in the Code of Non-Judicial Book Circulars until 1877.

Turning to Vol. 3, Code of Non-Judicial Circulars, referred to, we find that R. 5, Berar Sub-Tenancy Rules, requires the Tahsildar to enquire into the merits of any dispute with reference to a coshare or sub-tenancy and according to the decision he arrives at, to enter the name of the claimant with the extent of interest proved. These entries, therefore, go very strongly to show that the defendants cannot claim to be protected tenants; the lease for five years is clearly mentioned therein.

It has, however, been urged on behalf of the respondents that, even assuming that the lower appellate Court's finding has not been correct in some or all of the respects alluded to above, this Court is debarred, as a Court of second appeal, from interfering, and I have been referred to the decisions in *Tukaram v. Chintaram* (1), *Lachman Lal Chowdhri v. Kanhaya*

(1) A. I. R. 1924 Nag. 91=20 N. L. R. 17.

Lal Mowar (2), and *E. I. Ry. Co. v. Badrilal* (3), in support of this position. The judgment of their Lordships of the Privy Council in *Lachman Lal Chowdhri v. Kanhaya Lal Mowar* (2) is not much to the point, for, in the case of the appellant therein, there were concurrent findings of fact of both the lower Courts against him.

In the present instance, however, I do not find it necessary to discuss at length the general question of how far, if at all, this Court can interfere with a finding of fact duly arrived at by the two lower Courts, and, after proper consideration, for the simple reason that it is obvious that the conclusion of the Additional District Judge was arrived at, partly on a series of theories and assumptions, for the basis of which we are left completely in the dark, and partly because the learned Judge failed entirely to realize the evidential value of documents like Exs. P. 11 and P. 12. He assumed, in short, these documents to be quite other than what they actually were in force of law, and, proceeding on this wrong assumption, it is perfectly obvious, he entirely failed to appreciate their evidential value. It would be possible for this Court to proceed to determine the questions of fact involved, but, in view of the faulty manner in which the lower appellate Court has dealt therewith, I consider it desirable that the said Court should have another opportunity of reconsidering the appeal to it.

The judgment and decree of the lower appellate Court are accordingly reversed and the case is remanded to that Court for a fresh decision of Civil Appeal No. 56 of 1924 on the merits with advertence to the above remarks. The costs incurred in this Court will follow the event. There will be no certificate of refund of Court-fees.

D.D.

Case remanded.

(2) (1895) 22 Cal. 609 = 22 I. A. 51 = 6 Sar. 555 (P. C.).

(3) A. I. R. 1926 Nag. 192.

A. I. R. 1927 Nagpur 394

HALLIFAX, A. J. C.

Sakharam and another — Plaintiffs — Appellants.

v.

Mt. Kautikabai — Defendant — Respondent.

Second Appeal No. 224 of 1926, Decided on 22nd February 1927.

C.P. Tenancy Act (1920), S. 49 (2)—*Relinquishment by Hindu widow is not transfer—Registration Act*, S. 77.

A relinquishment by a Hindu widow of the whole estate including *sir*, inherited from her husband, in favour of his reversionary heirs without reservation of the cultivating rights in it, does not require permission from a revenue officer and its registration cannot be refused on the ground of its absence: *A. I. R. 1927 Nag. 44, Foll.* [P 394 C 2]

W. B. Pendharkar—for Appellants.

Judgment.—The plaintiffs claimed an order under S. 77, Registration Act, that a certain document should be registered. The suit has been dismissed in both the Courts below on the same ground as that on which registration was refused by the Sub-Registrar to whom the document was presented and by the District Registrar on appeal. The document is a relinquishment by a Hindu widow of the whole estate inherited from her husband in favour of his two reversionary heirs. As the estate includes *sir* land, it has been held that the document is a transfer of *sir* land (among other properties) without reservation of the cultivating rights in it which has not been sanctioned by a revenue officer, and, therefore, registration is forbidden by S. 49 (2), Tenancy Act 1920.

It has been explained in *Gauri Bai v. Gaya Bai* (1), that a surrender or relinquishment is not a transfer; it is merely a throwing away of property for somebody else to pick up, and to do that no more requires permission from a revenue officer or anybody else than to commit suicide would. That the deed of relinquishment is executed in favour of certain specified persons makes no difference. That is merely a statement by the widow that they are the persons entitled to take the estate after she abandons it, and, if they are not, the fact that she says they are will not help them. She retires and they come in on their own rights and not on any transfer to them by her. The correct view of the matter is indeed expressed in the document itself.

The decree of the lower appellate Court will be set aside, and in its place a decree will issue directing the document to be registered in the office of the Sub-Registrar, Wardha, if it be duly presented for registration within 30 days from this date. The defendant in the suit was the widow and she admitted the claim entirely in the first Court, where she incurred no

(1) A. I. R. 1927 Nag. 44 = 22 N. L. R. 169.

costs, and failed to appear in this and the lower appellate Court.

Under these circumstances no order in respect of costs is required here any more than it was required in either of the Courts below. Each of the learned Judges of those Courts has, however, ordered that the plaintiffs are to pay them all, and has fixed a pleader's fee of Rs. 72-12-0. Apart from the order being meaningless, that sum is obviously much too high for such a simple case; it is based on nothing but the fact that the value of the claim, for fixing the jurisdiction, was stated for one reason or another to be Rs. 2,910.

D.D.

Decree set aside.

A. I. R. 1927 Nagpur 395

KINKHEDE, A. J. C.

Kisanchandra — Defendant 1 — Appellant.

v.

Ramlal — Plaintiff — Respondent.

First Appeals Nos. 59-B and 60-B of 1925, Decided on 21st February 1927, from decree of Addl. Dist. Judge, Amraoti, D/- 17th June 1925, in Civil Suit No. 14 of 1924.

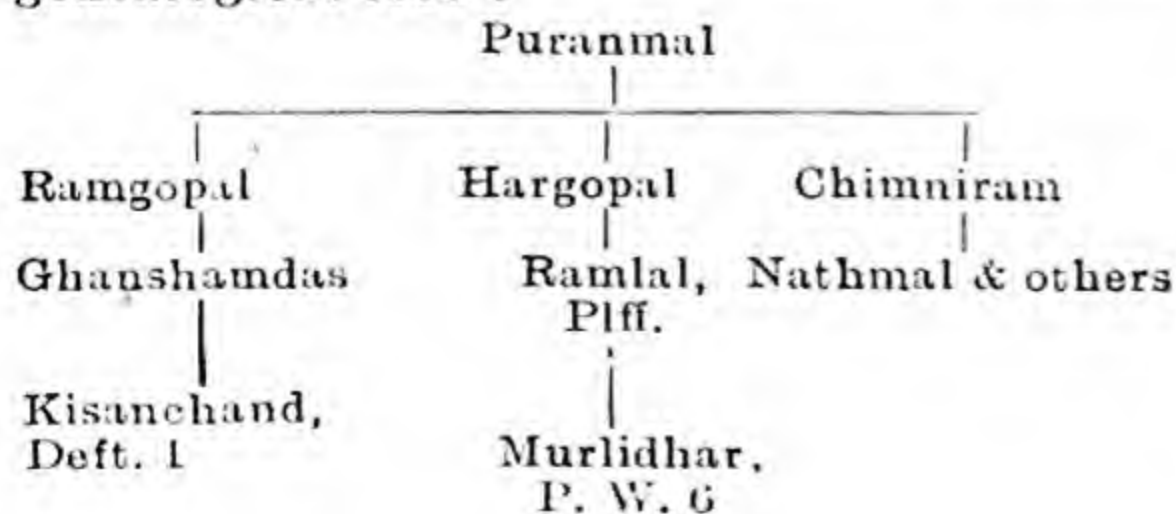
Cosharers—Adverse possession—Mere exclusive possession without assertion of hostile title by one does not set up adverse possession against another.

In the absence of any partition, or of a hostile assertion of title to the knowledge of the other coparceners or co-owners, the exclusive possession of one co-owner over a portion of a common property cannot set time running against others so as to give rise to a title by prescription in favour of the person in possession: *A.I.R. 1927 Mad. 111, Rel. on. [P 397 C 1]*

V. V. Chitale—for Appellant.

B. K. Bose, V. Bose, P. N. Rudra, M. R. Pathak and B. S. Bapat—for Respondent.

Judgment.—This judgment will also dispose of First Appeal No. 60-B of 1925. In order to understand the facts correctly it is necessary to give the following genealogical tree:



Puranmal owned the family firm known as "Mahanandram Puranmal" and "Puranmal Premasukhdas" was the name of a branch of that main firm; whereas the main firm had its business at Hyderabad Deccan, this branch firm did its business at Amraoti through its wahiwatdar and munim by name Shriramdas. This branch firm acquired two houses in suit at Amraoti bearing Municipal Nos. 3084 and 3087 prior to 1872. The aforesaid munim in charge of the Amraoti branch sold the two houses to a person doing business under the name and style of the firm of Ghanshamdas Chironjilal, owner Ghanshamdas of Hyderabad then residing at Amraoti, as per sale-deed dated 7th February 1876, of which Ex. 1 D 2 is a certified copy. According to the version given by plaintiff the houses were orally repurchased from the vendee and were in the possession of the family, but that since 1903-04, as the result of a family arrangement, they were allotted to his share. As defendant Kisanchand agreed to manage this house property at Amraoti for plaintiff, the latter assigned to the former by way of remuneration a 1 anna 9 pies share therein and thus retained 14 annas 3 pies for himself in each of the two houses. The plaintiff's case is that, since February 1924, defendant 1 began to set up an exclusive title to the two houses in suit in collusion with defendant 2. The two houses being in the occupation of different lessees, two separate suits, Nos. 14 and 15 of 1924, were instituted in the Court of the Addl. Dist. Judge, Amraoti, for recovery of joint possession to the extent of 14 annas 3 pies share in each.

The defence of Kisanchand, defendant 1, was that the above-mentioned purchaser, Ghanshamdas, was none but his father and that he acquired the said houses with his own separate money, and consequently his father, and after him he himself, was in sole and exclusive possession as owner of the same for about 50 years. He denied the so-called family arrangement and the assignment of 1 anna 9 pies share by plaintiff to him by way of remuneration for his management. In the alternative he also pleaded that he had acquired prescriptive title by the law of prescription and that plaintiff's claim was barred by limitation.

While, according to plaintiff, Sainirmal defendant 2, was defendant 1's agent,

defendant 1 urged that he ceased to be his agent from 12th June 1921, but that he occupied the premises as his tenant, and further that he had instituted a suit, No. 110/1923, against the said Samirmal in the Court of the 2nd Class Subordinate Judge No. 1, Amraoti, for his ejectment and for recovery of rent of first floor of house No. 3087; that similarly one Miss A. Kansingh was a tenant of the upper storeys of the two houses Nos. 3084 and 3087 and was sued by him for ejectment and recovery of rent, and a decree was obtained against her; that Samirmal acted as a mukhtyar of Miss A. Kansingh in the litigation and that he (Samirmal) did not want to vacate the houses and therefore collusively set up the present plaintiff to prefer this claim.

According to defendant 1, Ghanshamdas Chironjilal was the name of the firm at Amraoti which was exclusively owned and started in 1873 by his father Ghanshamdas. He, however, admitted that there was no person in the family known as Chironjilal, and explained the use of the word "Chironjilal" as an affix to indicate that the firm may live long.

According to the plaintiff the purchaser Ghanshamdas, was not the father of defendant 1, but was the naib of Akoli Jahagir belonging to the temple of Sitaran Maharaj, which was managed by the eldest member of the firm of Mahnandram Puranmal, and that the naib Ghanshamdas' son's name was Chironjilal.

As defendant 2 is not a party to this appeal I need not give a summary of his defence. The parties to this suit are admittedly Agarwals. Several issues were framed in the case. After holding the necessary trial of the issues, the Court of first instance came to the conclusion that the houses were sold to Ghanshamdas Brahmin and not to Ghanshamdas, the father of defendant 1; that they were repurchased from the vendee and thus became the family property again. It also found that the so-called family arrangement allotting the houses to the plaintiff and the assignment by him of 1 anna 9 pies share to the defendant by way of his remuneration for the management was not proved; further that the possession of defendant 1 was not in any way adverse to the plaintiff, and that consequently the latter was entitled to a

decree for joint possession of the two houses in suit to the extent of his 1/3rd share therein. Accordingly a decree for joint possession, to the extent of 1/3rd share of the houses which formed the subject-matter of each suit, was passed in plaintiff's favour and the rest of the claim was dismissed. The dismissal has become final as the plaintiff has not preferred any appeal against it. Defendant 1 alone has appealed against the decrees passed against him.

The suits out of which this appeal and First Appeal No. 60-B of 1925 arise, were instituted on 10th April 1924. The houses in dispute were admittedly sold as far back as 1876. Whereas, according to plaintiff, the purchaser was one Ghanshamdas Brahmin, the defendant's version was that it was his own father Ghanshamdas who purchased them. Which of these two versions is correct must necessarily be determined with reference to the evidence which related to the circumstances surrounding the transaction of sale. (The judgment then discussed the evidence and proceeded.) I therefore hold that the defendant-appellant has failed to establish that the houses in suit were purchased by his father Ghanshamdas as alleged by him. It therefore follows that the property in suit was not the self-acquisition of defendant 1's father, but had apparently become the property of Ghanshamdas Chironjilal Brahmin, who was in the service of the family.

The next question is whether the apparent vendee, Ghanshamdas Chironjilal, was a real vendee, or the sale in his favour was only bogus and intended to shield the property from the creditors. The lower Court has come to the conclusion that the sale to Ghanshamdas Chironjilal was a bogus sale; and that that bogus sale was transferred by adjustment of accounts between the parties to the sale. This conclusion is sufficiently borne out by the evidence on record and the probabilities of the case. The fact that Ghanshamdas Chironjilal never got possession of the houses, and that the firm of Puranmal Premeukhdas remained in the actual enjoyment of the income thereof, is the clearest indication of the fact that the transaction was only a shield. There is ample material on record to show that the houses continued to be owned all along by Puranmal Premeukh-

das, and later on stood in the name of Kisanchand Murlidhar in the municipal registers. This clearly shows that the property continued to be owned and possessed as joint property as before. There is no allegation of the parties that there was any partition by metes and bounds prior, or even subsequent, to 1876. The sons Ramgopal, Hargopal and Chimniram, who represented three branches, and, after them, their respective descendants, thus held a third share each in the same. They were therefore either coparceners or co-owners or tenants-in-common and enjoyed the property as such. Plaintiff had thus a title to the houses in suit to the extent of 1/3rd share.

The further question is whether the plaintiff's title was a subsisting title at the date of the suit, or it had become extinguished by reason of the fact that Kishanchand admittedly held and managed the houses all along through his agent Samirmal from 19th May 1906. The evidence on record clearly shows that plaintiff had no hand in this management. There is nothing to indicate that Kishanchand's exclusive management originated in a denial of the rights of the other co-owners including the plaintiff. In the absence of any partition, or of a hostile assertion of title to the knowledge of the other coparceners or co-owners, the exclusive possession of one co-owner over a portion of a common property cannot set time running against others so as to give rise to a title by prescription in favour of the person in possession: *Govindasami Chettiar v. Kothandapani Chettiar* (1). There is absolutely nothing on record to show that Kisanchand's possession was adverse to plaintiff. Kisanchand's management must therefore be treated as management by a member of the family for and in the interest of the joint family. The continuous record of the houses in question in the joint name of defendant and the plaintiff's son Murlidhar (as Kisanchand Murlidhar) clearly shows that Kisanchand did not treat the property as property belonging to himself to the exclusion of the plaintiff. There is thus no adverse possession and no bar of limitation.

The decree of the Court below which awards joint possession to the extent of 1/3rd share, cannot, under these circum-

stances, be treated as unjustified. I therefore affirm that decree and dismiss both the appeals with costs.

D.D.

Appeals dismissed.

A. I. R. 1927 Nagpur 397

PRIDEAUX, A. J. C.

Emperor

v.

Jodhraj and others—Accused.

Criminal Ref. No. 451 of 1926, Decided on 26th November 1926, made by Sess. Judge, Wardha, on 19th October 1926.

Criminal P. C., S. 539B—Provisions not infringed—High Court declined to interfere—Criminal P. C., S. 439.

When an order of discharge was challenged on the ground that S. 539B was not complied with, but was in reality obeyed, the High Court declined to interfere: *A. I. R. 1924 Cal. 1035, Dist.* [P 397 C 2, P 398 C 2]

*T. J. Kedar and W. B. Pendharkar—*for Accused.

Order.—The police challaned three persons under S. 295, I. P. C. (wrongly shown as S. 195 in the Sessions Judge's reference.) The Magistrate discharged the three accused under S. 253, Criminal P. C. The Sessions Judge gives the grounds for his reference as follows:

The Magistrate has not complied with the provisions of S. 539 (B), Criminal P. C. It is submitted that this is an illegality which vitiates the trial. I have no authority expressly on the point, but I refer to *Hirday Gorinda Sur v. Emperor* (1). In this case it seems to me likely that the complainant has been prejudiced. The complainant prayed for revision on other grounds, but these I do not consider to have any substance.

That case lays down that the omission to place on the record the memorandum of a local inspection is an illegality vitiating the conviction. In the present case the inspection-note of the Magistrate is on the record, but the Sessions Judge thinks that he did not give notice to the parties and, therefore, the discharge of the accused is illegal. It would have been well if he had asked the Magistrate for an explanation before submitting this reference. I have the Magistrate's explanation before me and this shows that he did give previous notice to visit the spot and that the Prosecuting Inspector and the accused's pleader were present at the time of his visit. It seems to me that the provisions of S. 539 (B)

(1) A. I. R. 1927 Mad. 111.

(1) A. I. R. 1924 Cal. 1035=52 Cal. 148.

I have, therefore, been complied with. It is unnecessary to go into the other allegations made by the complainant before the Sessions Judge, as the Judge does not base the present reference on them.

I decline to interfere. The records will be returned.

J.V.

Reference answered.

A. I. R. 1927 Nagpur 398 (1)

FINDLAY, J. C.

Wadgooji Kalar—Plaintiff—Appellant.
v.

Mahadeo and another—Defendants—Respondents.

Second Appeal No. 98 of 1927, Decided on 24th March 1927, from judgment of Addl. Dist. Judge, Nagpur, D/- 17th November 1926, in Civil Appeal No. 61 of 1926.

(a) *Civil P. C., O. 41, R. 27—Second appeal.*

The Courts should be chary about admitting fresh evidence in appeal, and this rule applies a fortiori to a second appeal also. [P 398 C 2]

(b) *Civil P. C., O. 41, R. 27—Appellant not diligent—Opportunity to produce additional evidence should not be given.*

Where the appellant had ample opportunity of producing the evidence in question in the lower Court and had chosen not to do so or had failed to do so, opportunity to produce additional evidence should not be given : 9 All. 366, *Foll.* [P 398 C 2]

R. N. Padhay—for Appellant.

Judgment.—The sole point urged by the pleader for the plaintiff-appellant is that this case should be remanded for fresh consideration after admission in evidence of a new document relating to the sale-deed of the plaintiff's old house. It is suggested that if this document were admitted, it would be possible with it and Exs. P. 1, P. 2 and P. 3, already on record, to measure exactly the dimensions and fix the site of the strip of land in dispute. Even if this be so, I can see no reason whatever for allowing such a course on second appeal.

It is urged on behalf of the plaintiff-appellant that it was owing to a misunderstanding he did not appreciate the value of the document now referred to in para. 4 of the petition of appeal. Even if we assume this, this only proves a want of due diligence on his part. It should have occurred to him primarily when he filed the suit, that such a document was essential to support his case

and, in any event, he has allowed the suit to drag on from June 1925 until the appeal was decided by the lower appellate Court on 17th November 1926, without apparently making any effort to produce the document in question.

It has again and again been pointed out that the Courts should be chary about admitting fresh evidence in appeal and this applies a fortiori to a second appeal also. The present case is in this respect analogous to the decision in *Ram Das Chakrabati v. Official Liquidator of Cotton Ginning Co. Ltd., Cawnpore* (1), where Edge, C. J., and Oldfield, J., refused to admit additional evidence on appeal on the ground that the appellant had ample opportunity of producing the evidence in question in the lower Court and had chosen not to do so or had failed to do so. I do not think, in those circumstances, the plaintiff should now be allowed to produce the evidence in question, and this being so, he has no case in second appeal. The appeal is accordingly dismissed without notice to the respondents.

D.D.

Appeal dismissed.

(1) [1887] 9 All. 366=(1887) A. W. N. 34

A. I. R. 1927 Nagpur 398 (2)

HALLIFAX, A. J. C.

Salabatkhan—Plaintiff—Appellant.
v.

Deo Rao and others—Defendants—Respondents.

Second Appeal No. 211 B of 1926, Decided on 22nd November 1926, from decree of Addl. Dist. Judge, Amraoti, D/- 13th February 1926, in Civil Appeal No. 260 of 1925.

Berar Patel and Patwaris Law (1900), S. 2—"Village" includes a "khel."

The suggestion that there could not be more than one revenue pitel for a village, or that separate revenue patels cannot be appointed for the different khels of one village, cannot be supported in view of S. 2 according to which the expression "village" means and includes a group of villages and the sub-division of a village known as a "khel". [P 399 C 1]

R. R. Jayawant—for Appellant.

Judgment.—The Central Provinces Village Sanitation and Public Management Act, 1920, applies to the four villages of Anjangaon, Surji, Ewazpur and Shahapur as a group. Anjangaon is divided in-

to eight khels, and there is a working revenue patel for each of them with one working police patel for all eight. Surji has two working patels, one revenue and one police, and Ewazpur and Shahapur have each one working patel only. The constitution of the committees formed under the Act is stated in Gazette Notification 1902/884/VIII of 17th August 1922, and so much of R. 4 (a) as affects this case runs as follows :

The panchayat shall consist of the working patel or patels and of such number of elected members, not less than four nor more than eight, as may be fixed by the Deputy Commissioner.

For this group of villages the Deputy Commissioner has fixed 8 as the number of elected members of the panchayat.

The plaintiff, who is a rate-payer of Anjangaon, prayed in the present suit for various declarations which come practically to this: that the rules do not authorize more than one revenue patel of Anjangaon to be a member of the panchayat. No single argument worthy of a moment's consideration seems to have been evolved in support of this contention in the three years during which the case has been before the Courts, nor can I imagine one.

Two despairing suggestions were made in this Court. One was that the working patel mentioned in the rule means only the police patel, because the revenue patel is not concerned with the matters regulated by the panchayat. The contention is so impossible that it was not put forward, even in the plaint, where it is admitted that the revenue patel of Surji and one revenue patel for Anjangaon are entitled to seats on the panchayat.

The other suggestion was that there could not be more than one revenue patel for a village, that is to say, that separate revenue patels cannot be appointed for the different khels of one village. Nothing has been said to support this contention, and to the direct contrary there is S. 2, Berar Patels and Patwaris Law, 1900, which says :

In this law, unless there is something repugnant in the subject or context, the expression "village" means an area for which the office of patel or patwari has been constituted, and includes a group of villages and the sub-division of a village known as a khel.

The plaint can hardly be said to disclose a cause of action, but anyhow the suit should have been dismissed in its first stage.

That is really all there is or ever was to be said, about the case. But the trial in the first Court took just over twenty months, involving the examination of seven witnesses for the plaintiff and eight for the defendants and the filing of thirty-eight documents with reference to seven stated issues, among which it is hard to find the single one that did arise, and culminating in a judgment of thirteen type-written pages of foolscap paper. In the nine pages of discussion of the case there is practically nothing in the reasons for the conclusions on the irrelevant matters examined, or in those conclusions that is sound, except the final conclusion that the suit ought to be dismissed. Even that, as was pointed out in the judgment of the lower appellate Court, is itself based on wrong conclusions.

The appeal is dismissed without notice to the respondents. Each of the learned Judges of the lower Courts has, through reprehensible carelessness, committed the injustice of ordering that the pleader's fee to be paid to the successful defendants is to be the ridiculous sum of Rs. 3-12-0.

D.D.

Appeal dismissed.

A. I. R. 1927 Nagpur 399

MACNAIR, A. J. C.

Yeshwant and others — Defendants—Appellants.

v.

Gangadhar and another — Plaintiffs—Respondents.

First Appeal No. 79 of 1926, decided on 1st September 1927, from order of 1st Class Sub-Judge, No. 1, Wardha, D/- 24th June 1926, in Civil Suit No. 4 of 1925.

Civil P. C., O. 23, R. 1 (3)—Withdrawal by a party from a suit—Court's order as regards costs is not appealable.

In a case where a party withdraws from a suit the Court's order as regards costs is not appealable.

[P 400 C 1]

R. N. Padhye—for Appellants.

M. R. Bobde—for Respondents.

Judgment.—The judgment in this appeal will govern the disposal of First Appeal No. 99 of 1926 (*Mt. Bhagirathi Bai v. Gangadhar and another*).

The respondents sued on a mortgage impleading both the sets of appellants along with another person. At a late stage of the case after each set of appellants had incurred considerable costs,

the plainiffs as against the appellants withdrew their suit without leave to sue again. A statement for the plaintiffs indicates that the reason was that they had little hope of success. The learned Judge allowed defendants 1 to 6 (the appellants before me) Rs. 50 as consolidated costs. Before me it is urged that the full costs incurred by the appellants should have been allowed.

It is first urged that the Court should have stated its reasons in writing for not allowing full costs. I am referred to *Meghraj v. Johnson* (1). But the order for costs was passed under O. 23, R. 1 (3) Sch. 1, Civil P. C. This rule states that when a plaintiff withdraws from a suit without permission to institute a fresh suit, he shall be liable for such costs as the Court may award. The rule that costs should ordinarily follow the event has clearly no application to such a case. There is no provision for an appeal against an order regarding costs passed under O. 23, R. 1, Civil P. C., such an order is incidental to the withdrawal from the suit. The appeals therefore do not lie. I have not been asked to treat them as applications for revision and it is possible that other considerations might have arisen, had I been asked to do so. I, therefore, dismiss the appeals. It does appear that the costs granted were inadequate, and I direct that costs in this Court will be borne as incurred.

S. J.

Appeals dismissed.

(1) [1915] 11 N. L. R. 189=31 I. C. 850.

A. I. R. 1927 Nagpur 400

FINDLAY, J. C.

Narayan and another—Defendants—Appellants.

v.

Raja Larman Rao—Plaintiff—Respondent.

Second Appeal No. 1 of 1927, Decided on 16th August 1927, from decree of Dist. Judge, Nagpur, D. 18th September 1926, in Civil Appeal No. 75 of 1926.

(a) *Acquiescence—Evidence Act, S. 115.*

A mere delay in filing a suit does not per se constitute acquiescence: 1 All. 82, *Foll.*

[P 401 C 1]

(b) *Limitation Act, Art. 141—Possession—Suit for—Giving an opportunity to the trespasser of removing the encroachment does not make the suit one for injunction.*

Suit is by an owner for possession of his wall which has been deliberately encroached upon and built upon by the defendants.

Held: that the suit was essentially one for possession and that incidental fact that under the law applicable to such a case in this country it is usual to give to the defendants an opportunity of removing the building, they have constructed on the land encroached upon, in no way makes the suit one for injunction. The defendants, if they so choose, need not remove the construction in question and, if so, it will fall to the owner of the wall to deal with it. The suit is clearly one for possession to which limitation of 12 years applies. [P 401 C 2]

M. R. Bobde—for Appellants.

B. K. Bose and K. K. Gandhe—for Respondent.

Judgment.—The facts of this case are sufficiently clear from the judgments of the two lower Courts. The defendants have now come up on second appeal to this Court against the judgment and decree of the lower appellate Court.

The first question for decision is what was the exact license or grant to the appellants. Their contention in this connexion is that no definite portion of the wall for the building of the staircase was given and that they were entitled to take as much of the wall as was reasonable for the purpose. Such a contention seems to me an utterly impossible one on the evidence on record. It is true that D. 11, the permission granted by the manager of the Senior Bhonsla Estate was vague in the extreme, but the words used clearly imply that only a small portion of the breadth of the wall was to be used for the purpose of building the staircase. The plaintiff Raja Laxman Rao (P. W. 3) and his brother were then separate and the defendants took the wise course of also obtaining permission from the former. From this point of view, the plaintiff and his brother were co-owners of the wall in question and not joint owners. The permission granted on behalf of the present plaintiff expressly stated that only two feet of the wall were given. An attempt has been made to suggest that the permission so given contained a patent ambiguity. This contention I find it utterly impossible to accept. Very clearly the reference could only be to a breadth of two feet along the wall which adjoins the defendant's house, and there cannot be a shadow of doubt but that the defendants knew from the first that they were only granted permission to construct their staircase on a space two feet broad on the northern side of the wall. The oral evidence on record, which indeed it is.

hardly necessary to allude to, on any reasonable construction of the terms of D. 8 and D. 11, makes the position sufficiently clear and there cannot be the slightest doubt but that the defendants from the first knew that it was intended by the plaintiff, and agreed upon by the parties, that they should only get a space along the wall of 2 feet in breadth. There was thus only an express license to this extent and admittedly the defendants have encroached far beyond it.

It has next been suggested that there was an implied license to construct the staircase, as has been done, and the grounds on which this allegation has been put forward are the conduct of the parties and a plea of acquiescence. As regards the conduct of the parties, it is clear that friction subsequently developed between them over another boundary dispute and that the present defendants succeeded in that suit (No. 59 of 1917), which was finally decided on appeal on 11th July 1922. It is suggested that the plaintiff lay low and raised no objection to the staircase as constructed until the letter (P. 2), dated 20th August 1921, was sent to the present defendants. That is apparently so, but it is a long step from these facts to presume that there had been actual acquiescence on the part of the plaintiff. It is more than possible that owing to lack of the supervision on the part of the plaintiff's manager and servants, the matter was never noticed until much later and this is indeed what the evidence of Narayan Rao (P. W. 1), manager, suggests. It is not even clear from his evidence that the encroachment was first noticed in 1917. What he says is that it came to light when measurements were being taken in connexion with the other suit between the parties and, as that suit went on for several years, the fact may very well have only come to notice about the year 1920 or 1921. I can find no proof whatever of acquiescence and this is true, even although the plaintiff had earlier notice than what seems to be the case of the encroachment. A mere delay in filing a suit, like the present, does not per se constitute acquiescence: cf. *Uda Begam v. Imam-ud-Din* (1). If a stranger builds on the land of another under a bona fide belief that it belongs to himself, the owner is entitled to recover the land, and

in this country the stranger is in the normal case, given an opportunity of removing the building thereon if he so desires. Here, we do not start from any bona fide belief on the part of the defendants that they were entitled to build a staircase of the breadth they did. The defendants clearly from the first knew that they were committing a deliberate encroachment which went far beyond the terms of their license. It is equally clear that there has been no proof that the plaintiff himself, or even his manager or servants, knew of the encroachment for a considerable time, and I can find nothing on the facts on record to support the plea of acquiescence.

The contention that the suit is barred by limitation, as it was, in effect, one for injunction, seems to me an utterly baseless one. The present suit is by an owner for possession of his wall which has been deliberately encroached upon and built upon by the defendants. The suit, in short, is essentially one for possession and the incidental fact that under the law applicable to such a case in this country, it is usual to give to the defendants an opportunity of removing the building they have constructed on the land encroached upon in no way makes the suit one for injunction. The defendants, if they so choose, need not remove the construction in question and, if so, it will fall to the owner of the wall to deal with it. The suit is clearly one for possession to which limitation of 12 years applies and the plaintiff is clearly entitled to the decree for ejectment which he has obtained.

The appeal accordingly fails and is dismissed. The appellants must bear the respondent's costs. Costs in the lower Courts as already ordered.

N.K.

Appeal dismissed.

A. I. R. 1927 Nagpur 401

KINKHEDE, A. J. C.

Sonaji and another—Defendants—Appellants.

v.

Dattu—Plaintiff—Respondent.

Second Appeal No. 319-B of 1926, Decided on 19th August 1927, from decree of 1st Addl. Dist. Judge, Akola, D/- 28th June 1926.

(1) [1926] 1 All. 82.

Limitation Act, S. 28—Adverse possession for more than 12 years—Owner cannot claim on title.

If a party who has been 12 years out of possession and whose suit is, therefore, barred, should again get into possession, he is not remitted to his old title. An owner cannot regain possession extra-judicially after lapse of the period of limitation prescribed for a suit to recover possession: 11 *B.L.R.* 237; 1 *Boul.* 70; 21 *All.* 204 and 6 *C.L.J.* 621, *Foll.* [P 402 C 1]

W. R. Puranik—for Appellants.

G. G. Hatwalne—for Respondent.

Judgment.—Two points are raised in this appeal: (1) that the portion alleged by plaintiff to be his was not proved to be his, but was the defendant's property, and (2) that at any rate it had become his by prescriptive title under S. 28, *Lim. Act*, long before the plaintiff took back forcible possession thereof from defendant-appellant on 5th July 1924.

As regards the first point: I do not think the decision of the lower appellate Court is open to challenge in second appeal. It is based on evidence proper for consideration, namely, the Record-of-Rights entries of 1912 and the other documentary evidence, as also oral evidence on record. I, therefore, decline to reconsider that finding.

As to the second point: the lower appellate Court does not seem to have at all considered it. It thought that the question of 12 years possession was immaterial as the plaintiff's title was proved and he was admittedly in possession within 12 years of the suit (i. e. since 5th July 1924). The defendant's contention was that even prior to 5th July 1924 he was in adverse possession of the portion in dispute for more than 12 years and that by such possession he acquired a prescriptive title as against the plaintiff, and that if after the plaintiff's title was thus extinguished under S. 28, *Lim. Act*, he (plaintiff) managed to regain possession extra-judicially, that possession could not be treated as owner's possession, and that defendant would be entitled to be replaced into possession. The argument, in short, is that "there is no remitter to a right for which the party had no remedy by action at all." In other words an owner cannot regain possession extra-judicially after lapse of the period of limitation prescribed for a suit to recover possession. There is much force in this contention and though none were cited at the Bar, decided cases could be found to support

it. I have been able to lay my hands on the following cases: In *Bindraban Chandur Roy v. Tarachand Bundo-padhya* (1) Mr. Justice Markby said that it was an accepted doctrine in our Courts that if a party who has been 12 years out of possession, and whose suit is, therefore, barred, should again get into possession, he is not (to use an English phrase) remitted to his old title; our Courts adopting, as pointed out by Sir Lawrence Peel in *Sibchunder Doss v. Sib Kissen Bonnerjee* (2) the English rule that "there is no remitter to a right for which the party has no remedy by action at all." cf. *Dalip Rai v. Deoki Rai* (3) and *Lilabati v. Bishun* (4) which endorse the same view.

The lower appellate Court has treated the question of possession as irrelevant. But this appears to me to be wrong if the facts are as alleged by the defendant. The defendant is entitled to a finding on the pleadings raised by him. As this point is material for the right determination of the suit, the case must go back for a fresh decision so far as this point is concerned. Had the point been regarded as relevant and considered, and even decided adversely to the defendant, the matter would have been different. But that is not what the Court did. Hence the necessity for remand.

I, therefore, remand the case for a proper decision of the case in the light of the above remarks. As the other findings are confirmed in this Court the lower appellate Court will not allow the parties to reopen points settled finally here. There will be no refund certificate. Other costs of this appeal shall be paid by the respondent. Costs in the Courts below will abide the event.

S.J.

Case remanded.

(1) 11 *B. L. R.* 237=20 *W. R.* 114.

(2) [1854] 1 *Boul.* 70.

(3) [1899] 21 *All.* 204=(1899) *A. W. N.* 36.

(4) [1907] 6 *C. L. J.* 621.

A. I. R. 1927 Nagpur 402

FINDLAY, J. C.

Ramrao—Plaintiff—Appellant.

v.

Gulabrao and another — Defendants—Respondents.

Second Appeal No. 501 of 1924, Decided on 22nd August 1927, from decree of Dist. Judge, Nagpur, D/- 8th September 1924, in Civil Appeal No. 99 of 1924.

(a) *Registration Act, S. 49—An unregistered deed is admissible to show nature of possession.*

Unregistered deed of gift is admissible in evidence in considering the question of the nature

of the possession : A. I. R. 1919 P. C. 44 and A. I. R. 1921 Mad. 82, Foll. ; 12 N. L. R. 139, Dist. [P 403 C 2]

(b) *Transfer of Property Act*, S. 123—Part performance.

The doctrine of part performance is applicable when there is no provable and enforceable agreement: S.A. No. 473 of 1923 (Nag.); A. I. R. 1914 P. C. 27 ; A. I. R. 1914 Mad. 271 ; A. I. R. 1923 Bom. 473 ; A. I. R. 1927 Rang. 33 (F. B.) ; A. I. R. 1919 P. C. 44, Foll. ; and A. I. R. 1922 Cal. 436, Dist. [P 403 C 1, 2]

(c) *C. P. Tenancy Act*—Sch. 2, Art. 1—Art. 1 applies in preference to Art. 47, Lim. Act.

Where the specific article applicable is the one contained in the Tenancy Act, while the more general article is the one contained in the Limitation Act, the former applies.

[P 404 C 2]

M. R. Bobde—for Appellant.

W. R. Puranik—for Respondents.

Judgment.—I need not repeat in detail the facts of the present case, which are clearly given in the judgments of the two lower Courts. The plaintiff Ramrao has now come up on appeal to this Court against the decree of the lower appellate Court, affirming that of the first Court dismissing his suit.

The first point urged on behalf of the plaintiff-appellant is that the unregistered deed of gift (1 D. 5) was wholly inadmissible in evidence, having regard to the provisions of S. 123, T. P. Act, and Ss. 17 and 49, Indian Registration Act, and it has been urged on the strength of the observations made by Stanyon, A. J. C., in *Dinanath v. Manbodh* (1), that, as the deed of gift in question was compulsorily registrable, it must be wholly excluded from consideration in the present case and is not, indeed, admissible in evidence at all.

For my own part, I am wholly unable to assent to this proposition. Their Lordships of the Privy Council have laid down a contrary view in *Varada Pillai v. Jeevarathnammal* (2), and *Kandasami Pillai v. Chinnabba* (3), and very clearly, in the circumstances of this case, the learned District Judge was perfectly justified in taking into consideration the deed of gift in connexion with the question of the nature of the possession of Jijabai, and, after her death, of her only son and heir.

It has next been urged that the doctrine of part performance was not applicable

in the circumstances of the present case, as there was in existence no provable and enforceable agreement. The circumstances of the decision in *Sanjib Chandra v. Santosh Kumar* (4) were somewhat special. The suit there was for specific performance of an agreement to lease certain property. The document, although compulsorily registrable, was unregistered and Rankin, J., held that, in the circumstances, it was inadmissible in evidence for the purpose of proving the agreement sought to be specifically performed. A view opposed to that offered by the appellant has been taken by a Bench of this Court in S. A. No. 473 of 1923, decided by Hallifax and Prideaux, A. J. Cs., on 13th January 1927 : cf. also *Mahomed Musa v. Aghore Kumar Ganguli* (5), *Vizagapatam Sugar Co. v. Muthuramareddi* (6), *Sandu Walji v. Bhikchand Surajmal* (7), and *Maung Ok Kyi v. Ma Pu* (8). Here, on the pleadings of the parties, even if the gift, as such, was invalid, the lower appellate Court has held that they have changed their position, and, from this point of view, I find myself in full agreement with the learned District Judge, that, in the circumstances of the present case, the doctrine of part performance applies. Their Lordships of the Privy Council's decision in *Varada Pillai v. Jeevarathnammal* (2), above quoted, seems, in short, to me to apply with full force in the circumstances of the present case and I am of opinion that the District Judge was correct in the view he took in this connexion.

It has been suggested that the wording of the deed of gift is not such as to show that possession actually passed. It might well be argued that its terms imply such passing of possession, but, in the present case, there is ample other evidence to show that possession did pass and, therefore, the recitals in 1 D. 5 are relevant and admissible to show the nature and kind of the possession.

The next question, which has been agitated in this second appeal, is that the lower Court's finding that Jijabai had been in possession is incorrect and is not

(4) A. I. R. 1922 Cal. 436=49 Cal. 507.

(5) A. I. R. 1914 P. C. 27=42 Cal. 801=42 I. A. 1 (P. C.).

(6) A. I. R. 1924 Mad. 271=46 Mad. 919 (F. B.).

(7) A. I. R. 1923 Bom. 473=47 Bom. 621.

(8) A. I. R. 1927 Rang. 33=4 Rang. 368 (F. B.).

(1) [1916] 12 N. L. R. 139=36 I. C. 547.

(2) A. I. R. 1919 P. C. 44=43 Mad. 244=46 I. A. 285 (P. C.).

(3) A. I. R. 1921 Mad. 82=44 Mad. 253.

justified by the evidence on record. It is true that the burden of proof in this connexion rested on the defendant-respondents and I have been referred to documentary evidence like that of the jama-bandis (P 10 and P 14) and the receipts (P 6 and P 7) as well as the malguzar's account-book (P 9) as establishing the plaintiff's position and showing that he paid rent for the field. All these matters, however, have been carefully and properly considered by the Judge of the lower appellate Court. The learned District Judge accounts for plaintiff's name appearing in the village papers by the fact that no registered deed of gift had been executed in order to avoid payment of nazarana or a suit by the lambadar for ejectment of the donee. Similarly, the learned District Judge thinks that the plaintiff may have paid rent for the field in order to create evidence of his possession. These inferences the learned District Judge was perfectly entitled to come to on the evidence on record, particularly when there is concrete and absolutely satisfactory evidence to show that the defendants have been in possession of the field and have effected specific improvements on it. It is impossible to say that the lower Court's careful finding on the question of possession is a wrong or illegal one and there is, therefore, no room left for interference on second appeal in this connexion.

Lastly, there arises the question of limitation and it has been somewhat ingenuously suggested in this Court that, as there were two articles prima facie applicable, the more specific should have been applied. The two provisions said to be applicable are Art. 47, Sch. 1, Lim. Act, which has reference to a suit by person who is aggrieved by an order for possession of immovable property passed under the Code of Civil Procedure, which was the case here, and the other is Art. 1, Sch. 2, to the C. P. Tenancy Act. The suggestion has been made on behalf of the plaintiff-appellant that Art. 47, Lim. Act, just quoted was the specific article and Art. 1, Tenancy Act, was the more general article, and that the limitation laid down in the former should, therefore, apply. Precisely the opposite is, of course, the actual position. The specific article applicable here is the one contained in the Tenancy Act, while the more general Article is the one contained in the Limi-

tation Act. A moment's consideration would show that the view offered on behalf of the appellant in this connexion leads to a sheer reductio ad absurdum. Were that view correct, it would be possible for any person claiming to be a tenant to set at naught the limitation laid down in the Tenancy Act by taking steps which might lead to proceedings under S. 145, Criminal P. C., and then claiming that he had a fresh limitation of three years. On the point of limitation alone, therefore, the present suit would, in any event, have been bound to fail.

The appeal is accordingly dismissed. The appellant must bear the respondent's costs. Costs in the lower Courts as already ordered.

N.K.

Appeal dismissed.

A. I. R. 1927 Nagpur 404

FINDLAY, J. C.

Ziba—Accused—Applicant.

v.

King-Emperor and another — Complainant—Non-applicants.

Criminal Revn. No. 164 of 1927, Decided on 18th August 1927, from order of Dist. Magistrate, Nagpur.

(a) *Penal Code, S. 37:—Seizure of a thing in the assertion of a bona fide claim of a right in absence of dishonest intention is not theft.*

The seizure of a thing in the assertion of a bona fide claim of a right though illegal does not amount to an offence in the absence of proof of the element of dishonesty: 44 Cal. 65, Foll. [P 405 C 1]

(b) *Criminal trial — Improper exclusion of evidence — Ambiguous recording of evidence — Trial is bad.*

Where evidence was improperly excluded; the evidence recorded was ambiguous in places and the Magistrate, although the identity of the thing stolen, was in doubt, did not have it produced for identification by the various witnesses.

Held: that the whole trial was bad.

[P 405 C 2]

*B. R. Mandlekar—*for Applicant.

*A. N. Chorghade—*for Non-Applicants.

Order. The applicant Ziba applies in revision for setting aside the conviction under S. 379, I. P. C. and sentence of a fine imposed on him by the 3rd Class Magistrate, Nagpur. On appeal, the District Magistrate maintained the conviction but reduced the fine to one of Rs. 15.

The trial of this case by the 3rd

Class Magistrate has been very badly carried through. The record of evidence is careless and untidy in the extreme and is, in places, almost unintelligible. As would appear from the cross-examination of Shivanandan Singh (P. W. 1), highly relevant evidence, which it was desired to lead as to the alleged existence of enmity between the complainant and the present applicant, was quite wrongly disallowed. Most important of all is the consideration that there was not only a doubt but the actual dispute between the parties as to the identity of the bullock alleged to have been seized by the applicant and yet the animal was not produced for identification before the witnesses.

It has been admitted before me by the pleader for the non-applicant that the present conviction and sentence could not, in any event, stand and all that has been urged is that a re-trial of the case should be ordered. The real question I have, therefore, to decide is whether the applicant is entitled to an immediate acquittal, or whether a re-trial of the case should be ordered.

For my own part, even if we assume that the identity of the bullock said to have been seized from the complainant (P. W. 1), Shivanandan Singh, and that in the possession of the applicant is one and the same, I do not think that this is a case which the criminal Court should have to waste more time in trying. It is perfectly clear that, if the applicant did seize the bullock, or did order his servant to seize it, this was done in the assertion of a bona fide claim of right. The seizure may have been illegal, but I do not think there has been any proof of the element of dishonesty: cf. *Arfan Ali v. Emperor* (1). Even, if we assume the complainant's story to be true the fact that one of the two bullocks only was seized, under the circumstances, goes strongly to suggest that the applicant considered he had a bona fide claim thereto. That the applicant's action was illegal and that he was probably civilly responsible therefor, is perfectly clear, but it is equally clear that the element of dishonesty has not been established. The evidence for the applicant strikes me as interested and discrepant, and that for the complainant is

perhaps not much better, as either party has taken up an extreme position, but it is perfectly obvious that, at the worst for the applicant, he seized the bullock under the assertion of some bona fide claim of right thereto.

As I have said, the case has been tried so perfunctorily that, in any event, a re-trial would have been necessary. Evidence was improperly excluded. The evidence recorded is ambiguous in places; the Magistrate, although the identity of the bullock was in doubt, did not have it produced for identification by the various witnesses, and, in any event, thus the whole trial was bad. In my opinion, however, the case is obviously one for the civil Courts and it would be a waste of time to allow the parties to fight it out de novo in the criminal Court. The conviction and sentence passed on the applicant are set aside and the fine, if paid, will be refunded. I make no order as regards the custody of the bullock supposed to have been restored. The parties must fight out this matter in the civil Courts.

N.K.

Conviction set aside.

* A. I. R. 1927 Nagpur 405

MACNAIR, A. J. C.

Thakurdas—Defendant 1—Appellant.
v.

Vishnu and others—Plaintiffs and Defendants 2 and 3—Respondents.

Second Appeal No. 22 of 1926, Decided on 14th September 1927, from decree of Dist. Judge, Nimar, D - 13th November 1925, in Civil Appeal No. 63 of 1925.

* *Civil P. C., O 21, R. 16—Decree—Assignment before passing of decree is valid—Transfer of Property Act, S. 6.*

Assignment of right, obtainable under a decree even before it is passed, is valid: *A. I. R. 1924 P. C. 162; 16 Mad. 429 and Gregg v. Bromley, (1912) 3 K. B. 474, Foll.* [P 405 C 1]

W. R. Puranik—for Appellant.

K. K. Gandhe and B. K. Bose—for Respondents.

Judgment—The plaintiff sued for a declaration that he was the owner of a decree assigned to him by defendants 2 and 3. The lower appellate Court has held that the factum of assignment has been proved. He states that the witnesses for the plaintiff tell a consistent and a probable story and he is unable to rely solely on the evidence of Champsi

(1) [1917] 44 Cal. 66=36 I.C. 136=20 C.W.N. 1270.

(D. W. 2) and his account. The plaintiff obtained a declaration in the first Court, and the first appeal was dismissed.

It is strongly urged before me that the finding of fact is incorrect. Reliance is placed on the fact that the plaintiff did not get his name substituted in the suit which resulted in a decree in favour of defendants 2 and 3. But this fact has been fully considered in para. 14 of the first Court's judgment. It is also stated that the Bombay Courts have come to a different conclusion when deciding the suit instituted by defendants 2 and 3. I do not see in what manner the opinion of the Bombay Courts, based on the evidence produced before them, is relevant. There is no reason, then, for interference with the finding of fact.

It is next urged that what purported to be an assignment had no effect in law, as a mere right to sue could not be transferred. The remarks of their Lordships of the Privy Council in *Subhadrayamma v. Venkatapati Raju* (1) appear to me to conclude this point. At p. 249 [of 48 *Mad.-Ed.*] the decision of Parker, J., in *Glegg v. Bromley* (2) is quoted with approval. The facts in *Glegg v. Bromley* (2) appear similar to those in the present case. One Mrs. G was plaintiff in an action for slander and assigned to her husband, as security for debts due to him any amount which she might obtain as a result of that action. Mrs. G obtained a verdict, and when one H endeavoured to attach the amount due from the defendant the husband of Mrs. G successfully claimed the sum under his assignment it was held that the assignment was not an assignment of a mere expectancy or of a cause of action.

Similarly, in *Palaniappa v. Lakshmanan* (3) it was held that a valid charge might be created on a sum of money due under a decree, although at the time of the creation no decree was in existence. The legal ground urged by the appellant therefore fails. The appeal is dismissed with costs on the appellant.

I add that it has been admitted before me that the decree is no longer in existence, and the result of this appeal affects nothing but the distribution of costs.

N.K.

Appeal dismissed.

(1) A. I. R. 1924 P. C. 162=18 *Mad.* 235 (P.C.).

(2) [1912] 2 K. B. 474=31 L. J. K. B. 1081=103 L. T. 825.

(3) [1893] 16 *Mad.* 429.

A. I. R. 1927 Nagpur 406

KINKHEDE, A. J. C.

Madhorao Sapre—Plaintiff 1—Appellant.

v.

Mt. Laxmibai and others—Defendants 1 & 2 and Plaintiffs 2 & 3—Respondents.

Second Appeal No. 437 of 1924, Decided on 1st November 1926, from decision of District Judge, Saugor, D/- 29th July 1924, in Civil Appeal No. 20 of 1924.

(a) *Civil P. C., O. 41, Rr. 4 and 33*—One of several plaintiffs appealing—Appeal can be decreed in favour of all.

Where one only of several plaintiffs, whose suit is dismissed, appeal the appellate Court can decree the appeal in favour of all, especially when the non-appealing plaintiffs are joined as respondents. [P 407 C 1, 2]

(b) *Record-of-Rights*—*Malik makbuza right* is conferred by settlement and once conferred it is final.

The *malik makbuza* right is the creation of the settlement. If the settlement officer gave that right to a certain person in respect of certain fields, a civil Court cannot go behind the settlement award and find that there was a mistake in the award and the right should have been conferred to certain other fields. The settlement entry recording a person as a *malik makbuza* proprietor in respect of certain lands is final and conclusive and one cannot go behind it or challenge it: 1 C. P. L. R. 146, *Foll.*

[P 409 C 1]

(c) *Mutation*—*Proceedings relating to, are not judicial proceedings and do not determine titles.*

Proceedings for the mutation of names are not a judicial proceedings, in which the title to and the proprietary rights in immovable property are determined. They are much more in the nature of fiscal inquiries instituted in the interest of the State for the purpose of ascertaining which of the several claimants for the occupation of certain denominations of immovable property may be put into occupation of it with greater confidence that the revenue for is will be paid: A. I. R. 1926 P. C. 103, *Foll.*

[P 410 C 1]

C. L. Subhedar and K. V. Deoskar—
for Appellant.

P. A. Pandit and S. B. Palsole—
for Respondents.

Judgment.—This second appeal arises out of a suit brought by three plaintiffs for possession of 2/3rd share out of the *malik makbuza* lands of mouzas Kaurkheda 40.39 acres, Borikhurd 16.64 acres and Mazgaon Patol 30.45 acres, which were recorded in the papers of the settlement of 1892 as held in common by Raghunath and Narhari, sons of Krishnaji and one Ramchandra, son of Raghunath, all of Sapre family presumable as co-owners

thereof. Neither party was at the stage of pleadings able to explain how these lands which admittedly were recorded in the name of Mt. Jamnabai, sister of Bhagubai, the wife of Krishnaji, came into the possession of the persons recorded as malik makbuza proprietors thereof at the settlement of 1892. The plaintiffs' case was that Ramchandra Rao the husband of Laxmibai, defendant 1, and the grandfather of Vinayak, defendant 2, held and managed the lands on behalf of the other co-owners, the sons of Bhagubai who were the predecessors-in-interest of the present plaintiffs 1 to 3, and that on his death in 1912-13 his widow defendant 1 as well managed the cultivation on their behalf. It was also their case that the deceased Ramchandra Rao was let into possession by Bhagubai's third sister Mathu Bai's adopted son Gangadhar Vinayak Rao, who was entitled to the remaining 1/3rd share of the lands. The plaintiffs called upon the defendants to effect a partition which they declined to do in 1920. Hence after a futile attempt to get their names brought on the mutation registers in 1920, they filed this suit on 10th April 1922. The trial Court held that the plaintiffs were not entitled to succeed as they failed to make out their relationship, and their subsisting right of suit, and the lower appellate Court has confirmed the dismissal though on different grounds. The appeal to the lower appellate Court was preferred by plaintiffs Madhorao and Anandrao and the plaintiff 3 was made a co-respondent 3. This second appeal is filed by plaintiff Madhorao, but he has joined plaintiffs 2 and 3 as co-respondents. Thus we have before us all the parties interested in the litigation either as appellants or respondents.

A preliminary objection is raised on behalf of the principal respondents 1 and 2, Laxmibai and Vinayak that the appellant Madhorao cannot press this appeal as regards the entire 2/3rds share as the other co-plaintiffs 2 and 3, have not joined as appellants, and they must be deemed to have accepted the dismissal of their suit so far as their individual interest in the lands was concerned. The plaintiff-appellant's counsel urges that in view of O. 41, R. 4 read with R. 33, Civil P. C., the appeal is competent, and this Court can grant the relief in its entirety even on an appeal by one of the

persons interested, and particularly because the non-appealing plaintiffs have been joined as co-respondents, and they are before this Court. I think the preliminary objection cannot be sustained in view of the provisions of the Civil Procedure Code relied on by the appellant. I therefore overrule the same and proceed to decide the appeal on its merits.

To my mind the case does not seem to have been handled from the right point of view in the Courts below. In the papers of the 30 years settlement when the award of proprietary rights was made Mt. Jamnabai was recorded as the malik makbuza muafidar of all the lands of Borikhurd and Kuarkheda Baji, Exs. P-20-21 and Exs. P-32-32. The word "tahayat" in Ex. P-32 which relates to the lands of Kuarkheda appears to have been used there to denote the duration of the revenue-free nature of the grant and not the quality of interest which the grantee held or possessed in the lands. The Government made the grantee the proprietor of the lands comprised in the grant, but instead of releasing the right to realize the revenue forever released it only for the lifetime of the grantee. In other words, the revenue-free character of the grant was liable to resumption on the death of the grantee. The lands of Mazgaon Patol were recorded at the 30 years settlement as the khudkhast of Mt. Jamnabai: Ex P-8-9. These lands were given to her for life as the remark in the remarks column shows. We do not know how long after the 30 years settlement Mt. Jamnabai lived. Whether she of her own accord gave away all these lands to her own sisters or sisters' sons, or they succeeded to it on her death, or they seized the lands thereafter under a claim of title either as sister or sister's sons, to the exclusion of Jamnabai's husband's heirs, the position is the same, in view of the subsequent settlement entries of 1892.

The lower appellate Court's surmise that the lands were acquired prior to Gangadhar's adoption (vide para. 70) cannot be accepted as correct as I will presently show in the following lines.

The adoption of Gangadhar by Vinayak Rao or his widow Mt. Mathubai was in all probability made some time between 1860 and 1870 as one may reasonably presume from the age of his son P. W. 4

being 50 in 1923. He must have been a married man for at least three or four years prior to 1873, when P. W. 4 must have been born and his adoption must necessarily precede his marriage. I think it very likely that Jamnabai herself made the grant: and that too to Krishnaji's surviving sons and to Gangadhar, because the persons *prima facie* entitled to be the preferable objects of Jamnabai's bounty would not be her well-provided sisters Bhagubai and Mathubai but their respective sons; as ultimately, after the death of their respective mothers they (sons) were to be lawfully entitled to their own mothers' shares i. e., Krishnaji's sons to Bhagubai's share and Gangadhar to his mother Mathubai's share qua her adopted son. As to whether they were to take *per capita* or *per stirpes* as representing their respective mothers, it could, no doubt, be a point for dispute between them which it was open to them to settle as best as they could. I presume that it had been effectively settled by giving Gangadhar or his nominee Ramchandra Rao a $\frac{1}{3}$ share in the lands and Bhagubai's sons taking only $\frac{2}{3}$.

In either case Ramchandra Rao, the husband of defendant 1 and the son of Rangnath, the natural brother of Gangadhar, could have no claim in his own right to the estate of Jamna Bai. If at all he could come in he could do so only through the kindness of Gangadhar who, being in affluent circumstances would feel compassion towards his relations in his natural father's line who were comparatively indigent and thus give them some help or means of support. It is, therefore, highly probable that Gangadhar who would not let his brother's son Ramchandra starve, would do something to improve his condition in life by letting him enjoy his own share of these lands and thus enabling him to acquire the position of a tenant-in-common with the other co-owners namely, the surviving sons of Krishna Rao and Bhagubai. The lower appellate Court could not rightly appreciate the needy condition of Ramchandra and the moral obligation which Gangadhar his uncle, in affluent circumstances, would feel to make an adequate provision for the benefit of his indigent relations in the family of his birth. He had his whole estate for his own son Sitaram, and what he was giving away

was practically an insignificant part of his big estate. I thus see nothing improbable in this provision being made by Gangadhar for Ramchandra. The attempt of Laxmibai as D. W. 6 or of Sitaram (P. W. 4) to show that the lands were held in her husband's family since the time of Rangnath, meaning thereby that they had not come from Jamnabai and that Krishnaji's sons would therefore have no claim, is in vain, for the simple reason that had the lands been inherited from Rangnath, we should have expected portions of these lands in the possession joint or separate of not merely Ramchandra Rao but also of his brothers and brothers' sons. They would also have figured as claimants at the settlement. But they have had no sort of possession over them as Laxmi Bai herself tells us in her deposition. That theory failing, the only theory of prior antecedent title is the one advanced and proved by the plaintiff with the help of Umabai's deposition; it appears quite consistent and highly probable. I thus see no reason to disbelieve her version of the grants of the lands, by Jamnabai to her two sisters' surviving sons, and by Gangadhar to Ramchandra of his one $\frac{1}{3}$ share out of them. In view of their remote antiquity very slight proof can suffice to induce anybody to accept such grants as the real foundation of the title to which the settlement entries of 1892 could be said to owe their origin.

Really speaking it was not necessary for the Courts below to go into the question of the antecedent title of these individuals in view of the fact that they were recorded as *malik makbuza* proprietors in the papers of the 12 years settlement of 1892-93: see Exs. P-59, P-23 and P-11. The lower appellate Court observes in para. 30 of its judgment in relation to the settlement *jamabandis* of the three villages that they in effect raised:

a very strong presumption that Krishnaji's sons were then entitled to part if not to all of the lands, and it is reasonable to conclude that the lands had come into their possession because of the relationship of Jamnabai and Bhagubai. Though Jamnabai had only a life-estate in the absence of reversioners it is quite natural that her nephews should get into possession even during her lifetime, and prior to the adoption of Gangadhar by Mt. Mathubai.

For reasons given above I do not, however, agree with the remark that the grant by Jamnabai was "prior to the

adoption of Gangadhar". In para. 31 we find the said Judge remarking that:

presumably the settlement was given to those who appeared in 1892, to be entitled.

The gist of para. 31 also is that in the settlement proceedings Ramchandra Rao represented the common interests of himself and Krishna Rao's sons Narhari and Raghunath. In para. 35 the Judge observes:

It is very unlikely that Ramchandra Rao could have ever had any title to the land except one which was dependent on the permission of the sons of Krishnaji (and I may add of Gangadhar) in view of his relationship with them. Whether he was given shares or seized shares, I am convinced he was given them or seized them in virtue of this relationship.

Paragraph 36 makes out that the position of Ramchandra Rao and the sons of Krishna Rao was that of co-owners as the following extract would show :

The revenue papers set up a strong presumption of title in favour of the sons of Krishnaji at the time of the settlement, and in my opinion it is unnecessary for the plaintiffs to prove title prior to the settlement. At the time of settlement the position of Ramchandra Rao appears ambiguous, but I find that as regards Kuarkhera co-ownership existed in equal shares between Raghunath Narhari and Ramchandra after the death of Vinayak, as regards Borikhurd in similar shares from Sambhat 1951, and as regards Mazgaon between Raghunath and Ramchandra in equal shares, from the same date.

When we read the above observations in the light of the ruling of this Court in *Sheodayal v. Balaram* (1), that the malik makbuza right is the creation of the settlement, the position of plaintiffs as malik makbuza proprietors in their own right becomes very clear, so also that of Ramchandra Rao as their co-owner becomes unassailable. In the said case of *Sheodayal v. Balaram* (1) it was held that if the Settlement officer gave that right to a certain person in respect of certain fields a civil Court cannot go behind the settlement award and find that there was a mistake in the award and the right should have been conferred to certain other fields. This ruling enunciates the principle that the settlement entry recording a person as a malik makbuza proprietor in respect of certain lands is final and conclusive and one cannot go behind it or challenge it. It is thus clear that we must proceed on the footing of the settlement entries of 1892 being the very foundation of the common title of plaintiffs and of defendant 1's husband Ramchandra Rao: in the absence

of anything to the contrary, the share of Ramchandra Rao was $\frac{1}{3}$.

It was in exercise of this common title and in assertion of the rights of all the co-owners that Ramchandra Rao acted in the settlement proceedings and accepted the assessments as per settlement form S. 11 (Ex. P-59) dated 22nd February 1893 on behalf of all. He thus avowedly declared his representative character at the time of the settlement enquiry and purported to act on behalf of his other co-owners also. He thus held himself out as the accredited and managing agent of the other co-owners. The subsequent jamabandis also were in substantial agreement with this joint or common title solemnly admitted at the settlement, though there may be some slight variations now and then.

Plaintiffs Madhorao and Anandrao's father Narhari died in 1897 leaving them behind. Madhorao was 15 and Anandrao had presumably just attained majority. Raghunath died in 1899 but the names of Narhari and Raghunath continued to be recorded in the mutation registers up to 1902-03 when defendant 1's husband Ramchandra Rao appears to have managed to secure mutation in his sole name : Exs. P-31, P-3 and P-4. There is nothing on the record to show that this mutation was ordered after notices to or with the consent of plaintiffs 1 to 3. The plaintiffs' interest would, therefore, remain unaffected by such mutation entries unless knowledge thereof is brought home to them of a date prior to 12 years before suit. The plaintiffs have admitted the knowledge of the year 1920 in paras. 4 and 5 of the plaint. It was, therefore, the duty of the defendant to prove or impute knowledge of a prior date. Even if it be considered that plaintiffs may by means of the interview arranged in March 1911 through Mr. Golwalkar (P. W. 6) be fixed with knowledge of all details still this does not take us back to more than 12 years before the date of the institution of the suit which is 10th April 1922, even then, the claim is within limitation.

At this stage it is pertinent to remark that at the interview which Ramchandra Rao is proved to have had with P. W. 6 in March 1911, he did not take up an attitude of hostility towards the plaintiffs but seemed amenable to any reasonable amicable settlement (vide para 40, lower appellate Court's judgment). This

(1) [1888] 1 C. P. L. R. 146.

seems very natural and proves the inner consciousness on Ramchandra Rao's part that though he alone was enjoying the income of the lands managed by him he was not the sole owner thereof. I see no reason to distrust Mr. Golwalkar when he says that Ramchandra Rao did not seem to be opposed to a settlement. This must naturally have put the plaintiffs off their guard and led them to accept his word of assurance that the matter could be satisfactorily settled without recourse to a law suit; this could clearly constitute in the eye of the law an admission of plaintiffs' right, or, at any rate, was in the nature of a non-assertion of a hostile claim, which would convey the impression that the managing co-owner had not repudiated his former representative character. He, however, soon after died in 1912-13. Thus the attitude of Ramchandra Rao till his death can safely be inferred to have been one of friendliness and not of hostility towards his co-owners in respect of the lands in suit.

The story which the lower appellate Court seems to have adopted in paras. 37 and 44 of the judgment of Madhorao's father Narhari and uncle Raghunath having deliberately abandoned their shares in favour of Ramchandra Rao before their deaths has no foundation in reality and appears to be a pure invention. The inference based thereon that "the doctrine of one co-sharer holding on behalf of all" could not therefore be applied "after Ramchandra Rao had obtained mutation" does not hold good here. I may here usefully quote the observations of their Lordships of the Privy Council in the most recent case of *Nirman Singh v. Lal Rudra Partab*, A. I. R. 1926 P. C. 100 as they are very pertinent to this case:

The perusal by their Lordships of the judgment of the Court of the Judicial Commissioner of Oudh, leads their Lordships to think that its judgment is to a great degree based on the mischievous but persistent error that the proceedings for the mutation of names is a judicial proceeding, in which the title to and the proprietary rights in immovable property are determined. They are nothing of the kind as has been pointed out times innumerable by the Judicial Committee. They are much more in the nature of fiscal inquiries instituted in the interest of the State for the purpose of ascertaining which of the several claimants for the occupation of certain denominations of immovable property may be put into occupation of it with greater confidence that the revenue for it will be paid.

Had the learned District Judge kept

this distinction between mutation and judicial proceedings before his mind I dare say he would not have fallen into the error of thinking that from 1902 when Ramchandra Rao secured mutation in his sole name his possession was not on behalf of, but became adverse to, his co-owners. Assuming Ramchandra Rao did "set up a claim to be sole proprietary owner" of these lands "entitled to an interest in which" the present plaintiffs "had no claim," then, in the words of their Lordships themselves,

these revenue authorities had no jurisdiction to pronounce upon the validity of such a claim and from the orders it would appear they did not attempt to do so. It is perfectly clear that the orders already referred to did not effect and were not intended or designed to effect *proprio vigore* an exclusion of the plaintiffs from all interest in the property.

in which they are interested as tenants in common to the extent of two-thirds.

In this view of the case, the title of the plaintiffs being intact and being shown to be subsisting, they are entitled to a decree for separate possession of their two-thirds share of all the lands in suit by partition as against defendants 1 and 2.

The decrees of the lower Courts are set aside and the plaintiffs' claim decreed with costs throughout against the defendants who will bear their own costs in all Courts. As this decision proceeds upon a ground common to all the plaintiffs respondents 3 and 4 who are originally plaintiffs 2 and 3 shall also be entitled to the benefit of this reversal.

D.D.

Decree set aside.

A. I. R. 1927 Nagpur 410

PRIDEAUX, A. J. C.

Mst. Bani Bai—Defendant—Appellant.

v.

Mahadeo—Plaintiff—Respondent.

Second Appeal No. 541 of 1927, Decided on 10th November 1927, from decree of Addl. Dist. Judge, Wardha, D/- 22nd July 1927, in Civil Appeal No. 54 of 1926.

Practice—New case—Court cannot make a new case for the party.

When the case found by the lower appellate Court was not the case tried and the relief decreed was not the relief sought, in such a case the suit should be dismissed. [P 411 C 2]

M. B. Niyogi—for Appellant.

M. R. Bobde—for Respondent.

Judgment.—The plaintiff in this suit claimed from the defendant his lambardari haq for the years 1331 to 1333 Fasli. The case was tried and a decree was given in favour of the plaintiff for Rs. 58-6-6. On appeal it was discovered that it was not the lambardari haq which the plaintiff could claim but the muccadami haq quite a different thing. The lower Appellate Court's order-sheet of 15th May 1926, runs:

As regards ground No. 1, Mr. Karode urges that his claim to five per cent. is based on being a muccadam and not a lambardar though the point was not made clear in the lower Court. Lower Court allowed lambardari haq on the ground that it was allowed in a previous suit, but that point will not be res judicata as the right is a recurring one. Mr. Gole admits that if plaintiff is allowed muccadami haq, the account per year is correct, and he would then contend only about interest. He wants time to state whether the plaintiff was muccadam during the three years in suit.

The order-sheet of the next hearing runs:

Appellant by Mr. Gole. He admits that plaintiff and his father were muccadams for the three years in suit. The only question for argument is whether muccadam haq should be allowed or not.

It is contended for the appellant (defendant) here that under S. 192, Land Revenue Act, the remuneration of the muccadam has to be fixed by the Tahsildar and recovered by the lambardar from

the proprietors of the mahal or patti for which he is appointed, and it is argued that the civil Courts cannot take cognizance of the case. It is further contended that under S. 229, Cl. (p) of that Act, any claim in connexion with the office or remuneration of the muccadam is not cognizable by a civil Court. It does not seem to me necessary to enter into these contentions; for it appears to me that the suit should be dismissed on the ground that it was brought for recovery of the lambardari haq; it was not for the recovery of the muccadami haq which has been decreed by the lower appellate Court. This change in the case in the lower appellate Court has prevented suitable issues being raised in the trial Court; and if a plaintiff is so careless as to make a mistake of this nature, although he may be repeating only a mistake made in previous proceedings, he has only himself to blame if his case fails. The relief decreed is not the relief sought; the case found by the lower appellate Court was not the case tried; and under these circumstances I think that the plaintiff's claim should be dismissed with costs. I set aside the decree of the lower appellate Court and dismiss the case with costs.

N.K.

Appeal allowed.

Time

Author [REDACTED] 10/2/84

Accession No. [REDACTED]

GUN No. [REDACTED]

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